Supreme Court, U.S.
FILED

NO. 031039 JAN 15 2004

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Boyde v. California*, 494 U.S. 370 (1990), this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, which directs a jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The mitigating evidence at issue in *Boyde* was pre-crime evidence in mitigation. Relying on *Boyde*, the California Supreme Court held that California's "catch-all" mitigation instruction in this capital case is constitutional as applied to post-crime evidence in mitigation. In a 6-5 decision, the en banc Ninth Circuit held that the California Supreme Court decision was objectively unreasonable "because *Boyde* does not control this case." The question presented is:

Did the Ninth Circuit violate 28 U.S.C. § 2254(d) when it found the California Supreme Court objectively unreasonable in holding that California's "catch-all" mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

JEANNE WOODFORD, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

Jeanne Woodford, Warden, California State Prison at San Quentin [hereinafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit (en banc) following remand by this Court is reported at *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003) ("*Payton II*") and contained in Appendix A. This Court's prior order granting certiorari and remanding to the Ninth Circuit is reported at *Woodford v. Payton*, 123 S. Ct. 1785, 155 L. Ed. 2d 662 (2003) and is contained in Appendix B. The opinion of the Ninth Circuit (en banc) preceding remand by this Court is reported at *Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002) ("*Payton I*") and contained in Appendix C. The opinion of the Ninth Circuit (panel) is reported at *Payton v. Woodford*, 258 F.3d 905 (9th Cir. 2001) and contained in Appendix D. The order of the District Court is unreported and contained in Appendix E.

The opinion of the Supreme Court of California is reported at *People v. Payton*, 3 Cal. 4th 1050, 839 P.2d 1035, 13 Cal. Rptr. 2d 526 (1992) and is contained in Appendix F.

STATEMENT OF JURISDICTION

An en banc panel of the Ninth Circuit entered judgment granting habeas corpus relief on October 20, 2003. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment of the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1), which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

California Penal Code section 190.3, which provides in pertinent part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> . . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

App. G.

STATEMENT OF THE CASE

Underlying Facts And The Trial

In the early hours of May 26, 1980, Respondent William Charles Payton went to the home of Patricia Pensinger in Garden Grove, California, where he had once been a boarder. After receiving permission from Patricia to sleep on her couch, Payton entered the room of one of Patricia's borders, Pamela Montgomery, and raped and stabbed her to death.

After cleaning himself off in the bathroom, Payton entered Patricia's bedroom while she and her ten year old son, Blaine, slept. Payton inflicted 40 stabs wounds to Patricia's face, neck, back and chest. He inflicted 23 stabs wounds to Blaine's face, neck and back. Both survived. A state court jury found Payton guilty of first-degree murder, rape and two counts of attempted murder. The jury further found true the special circumstance of murder in the commission or attempted commission of rape and the personal knife use enhancement.

At the penalty phase, the prosecutor introduced evidence of a prior incident in which Payton stabbed a former girlfriend in the chest and arms after waking her, and Payton's jail house conversations in which he said he had "a severe problem with

sex and women" and "that all women on the street that he had seen was [sic] a potential victim, regardless of age or looks." In mitigation, Payton's defense presented post-crime character evidence consisting of eight witnesses who testified that he had made a sincere commitment to God while in prison, had a calming effect on other prisoners, and could help others while in prison through Bible study classes and a prison ministry.

During closing argument, the prosecutor and Payton's defense counsel discussed California's then existing "catch-all" mitigation evidence instruction ("factor (k)"), California Penal Code section 190.3(k), which advised the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Jury Instructions, Criminal, No. 8.84.1 (4th ed. 1979) ("CALJIC"). The prosecutor argued, in pertinent part, that the instruction "doesn't refer to anything after the fact or later," and defense counsel unsuccessfully moved for mistrial. The judge, however, admonished the jury, "[a]gain, I want to emphasize to you that comments by both prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective." Thereafter, the prosecutor concluded:

> How do the factors line up? The circumstances and facts of the case, the defendant's other acts showing violence, Mrs. Pensinger and Mrs. Stone, . . . Blaine Pensinger, the defendant's two prior convictions line up against really nothing except defendant's newborn Christianity and the fact that he's 28 years old.

Defense counsel argued to the jury that the factor (k) instruction was a catch-all instruction designed to include the kind of evidence that Payton presented.

The trial court's final instructions to the jury included the following direction concerning the consideration of mitigation evidence:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

The jury returned a verdict of death. The trial court denied Payton's motion to modify the verdict and sentenced Payton to death for the murder of Pamela Montgomery and to 21 years and eight months in state prison for the rape of Pamela Montgomery and the attempted murders of Patricia and Blaine Pensinger.

Direct Appeal To The California Supreme Court

On automatic appeal to the California Supreme Court, Payton argued that his penalty-phase jury was unconstitutionally precluded from considering his mitigation evidence in determining whether he should receive a sentence of life or death. He maintained that the trial court's instructions were inadequate to counter the prosecutor's misstatement of law advising the jury that it could only consider circumstances related to the crime. In a 5-2 decision, the California Supreme Court rejected his claims and affirmed Payton's convictions and sentence of death. Applying, *Boyde v. California*, 494 U.S. 370 (1990), the California Supreme Court held that it is not reasonably likely that Payton's jury understood the court's instructions as precluding consideration of his non-crime related evidence in mitigation. App. F at 140, 162, 164.

The California Supreme Court found that Payton's jury was instructed with the same "catch-all" mitigation instruction

that this Court in *Boyde* found constitutional, and that this Court's decision in *Boyde* rejected many of the precise arguments made by Payton. App. F at 160-162. Thus, citing *Boyde*, the California Supreme Court held that, although the trial court "did not embellish the language of factor (k), that fact standing alone does not support a claim of error." App. F. at 164. Additionally, the California Supreme Court examined the instructions "in the context of the proceedings" as required under *Boyde*. The California Supreme Court found that the prosecutor's incorrect interpretation of the "catch-all" mitigation instruction was blunted by: (1) the court's other standard instructions, the same instructions that *Boyde* held "made it even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime related evidence in mitigation;" (2) the fact that arguments of counsel carry less weight than instructions from the court; (3) the prosecutor's own discussion of Payton's mitigating evidence; (4) defense counsel's correct statement of the law; and (5) the fact that the only evidence in mitigation presented by Payton related to his post-crime religious conversion and good works in prison. Accordingly, the California Supreme Court found neither the instruction nor the context of the proceedings was reasonably likely to mislead Payton's jury into believing it could not consider Payton's post-crime character evidence in mitigation in determining his sentence. App. F at 161-164. Payton's petition for certiorari was denied. *Payton v. California*, 510 U.S. 1040 (1994).

***De Novo* Federal Habeas Corpus Review**

On May 6, 1996, Payton filed his first petition for a writ of habeas corpus in the United States District Court for the Central District of California. Although his petition was filed after the effective date of AEDPA, the District Court (and later the Ninth Circuit panel and the initial en banc panel of the Ninth Circuit) reviewed Payton's claims *de novo*.

The District Court granted the petition as to the penalty phase, holding that the prosecutor's incorrect factor (k) argument so infected the penalty trial as to deny Payton a fair trial. App. E at 131, 138. On appeal to the Ninth Circuit, a divided panel reversed the grant of habeas relief, holding that the prosecutor's incorrect argument did not so infect the penalty trial as to preclude consideration of Payton's mitigation evidence. App. D at 98-107. The Ninth Circuit granted Payton's petition for rehearing en banc.

In a 6-5 opinion, an en banc panel of the Ninth Circuit affirmed the district court's grant of habeas relief as to the penalty phase. App. C at 71. Applying *de novo* review, the majority found:

> *Boyde* did not address the question whether, on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to post-crime evidence. The fact that all of Payton's mitigating evidence was post-crime distinguishes this case from the pre-crime evidence at issue in *Boyde* which more readily fits within factor (k).

App. C at 60 (internal quotation and citation omitted) (Paez, J., joined by Schroeder, C.J., Pregerson, J., Tashima, J., W. Fletcher, J., and Berzon, J.).

According to the majority opinion:

> Most naturally read, the phrase "extenuates the gravity of the crime" refers to evidence relating to or ameliorating the crime itself. On its face, factor (k) does not encompass the kind of post-crime evidence of good works, leadership and religious beliefs that Payton presented at the penalty phase of his trial.

App. C at 59. The majority ruled that, "[u]nlike the pre-crime evidence in *Boyde*, post-crime mitigation evidence is simply not covered by any natural reading of the words of the unadorned

factor (k) instruction. Mitigation evidence occurring after the crime cannot possibly 'extenuate the gravity of the crime.'" App. C at 61. Therefore, the majority concluded, "[b]ecause the unadorned factor (k) instruction does not encompass post-crime evidence, it violates *Skipper's* [*v. South Carolina*, 476 U.S. 1 (1986)] requirement that the jury be permitted to consider post-crime good behavior as mitigating evidence in deciding whether to impose the death penalty." App. C at 61. Accordingly, the majority held, "[s]tanding alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence." App. C at 61.

The majority further held that, because there was "an absence of instruction" directing the jury to consider Payton's post-crime evidence in mitigation, the prosecutor's incorrect argument concerning factor (k) constituted the instructions to the jury. As such, there was a reasonable likelihood the jury understood the instructions as precluding consideration of Payton's mitigation evidence. App. C at 62-66. The majority then imposed an affirmative duty on the state trial court to instruct Payton's jury "that it must take his post-crime mitigation evidence into account in determining whether to impose a sentence of life or death." App. C at 71.

The dissent, also applying the higher *de novo* standard of review, concluded that *Boyde's* holding—that the "catch-all" mitigation instruction was constitutionally adequate—applied equally to Payton's case. App. C at 72 (Tallman, J., joined by Kozinski, J., Trott, J., Fernandez, J., and T.G. Nelson, J.). Like the California Supreme Court majority, the dissent noted *Boyde's* conclusion that factor (k) permitted consideration of "any other circumstance," not just circumstances related to the crime. App. C at 76-77. Further, the dissent reasoned, "as both the Supreme Court in *Boyde* and our court's opinion here recognize, factor (k) allows jurors to consider a defendant's character. And that is basically what defense counsel tried to show during the penalty phase – that Payton had undergone a character transformation after being jailed." App. C at 78. The

dissent concluded: "there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths or are any more excluded from a reading of factor (k)." App. C at 78.

The dissent also found that "the context of the proceedings" further bolstered its conclusion that there was no reasonable likelihood the jury understood the instructions to preclude consideration of Payton's mitigation evidence. Like the California Supreme Court, the dissent relied upon *Boyde's* principles that arguments of counsel carry less weight, a jury is not likely to disregard the only evidence presented, and that other instructions told the jury to consider all of the evidence. App. C at 78-83.

Federal Habeas Corpus Review Under AEDPA

Pursuant to *Woodford v. Garceau*, 538 U.S. 202 (2003), the Court granted the State's petition for a writ of certiorari and remanded this case to the Ninth Circuit to reconsider its decision under the principles of AEDPA. App. B at 45.

By the identical 6-5 vote, the en banc panel of the Ninth Circuit again affirmed the district court's grant of habeas relief as to the penalty phase on the ground that California's "catch-all" mitigation instruction was unconstitutional as applied to post-crime evidence in mitigation and that it was reasonably likely that Payton's jury understood the court's instructions as precluding consideration of Payton's post-crime character evidence in mitigation.

Writing for the majority, Judge Paez acknowledged the California Supreme Court's correct recitation of clearly established law, namely, that the Eighth Amendment requires the sentencer in a capital case to consider and give effect to all relevant mitigation evidence offered by the defendant. App. A at 14-15. However, the majority found that the California Supreme Court unreasonably applied this precedent because, in

analyzing Payton's claim, the California Supreme Court "focused entirely on the United States Supreme Court's decision in *Boyde*," which "does not control this case." App. A at 15. The majority then reiterated its reasoning that *Boyde's* decision to uphold the constitutionality of the "catch-all" mitigation instruction turned on the pre-crime nature of Boyde's character and background evidence because such evidence related to the crime by providing an "excuse" for the crime. App. A at 15. In contrast, found the majority, Payton's post-crime character evidence "cannot possibly 'extenuate the gravity of the crime.'" App. A at 17.

The majority also found that the California Supreme Court was objectively unreasonable in finding the "context of the proceedings" did not mislead the jury concerning its ability to consider Payton's mitigation evidence. The majority found wholly inapplicable *Boyde's* principles that arguments of counsel carry less weight, that a jury is not likely to disregard the only evidence presented, and that the other instructions told the jury to consider all of the evidence. According to the majority, these principles also turned on the pre-crime nature of the Boyde's evidence and further on the lack of objectionable argument by the prosecutor. App. A at 16-17. The majority concluded that because the prosecutor in Payton's trial misstated the law and Payton's mitigation evidence was post-crime, the California Supreme Court was objectively unreasonable in applying *Boyde's* principles to Payton's case. App. A at 20-25. Consequently, the majority opinion again held: "Payton is entitled to a penalty trial before a jury who is properly instructed that it must take his post-crime evidence in mitigation into account in determining whether to impose a sentence of life or death." App. A at 30.

The dissent began by observing that "[t]oday, six judges of this court announce that the legal conclusion reached by *seven*[1/] of their colleagues (*plus* five justices of the California Supreme Court) is not only wrong, but *objectively unreasonable* in light of clearly established federal law." (Emphasis in original). App. A at 31. To the contrary, contended the dissent, the "California Supreme Court's application of *Boyde* was not only reasonable but correct." App. A at 33. The dissent reiterated its position that *Boyde's* holding concerning the constitutionality of the "catch-all" instruction applied equally to Payton's post-crime evidence in mitigation. App. A at 33-36. Moreover, the dissent emphasized the limits on federal habeas corpus review imposed by AEDPA:

> Perhaps I am wrong and the majority is correct that *Boyde* is distinguishable from this case because it concerned pre-crime mitigation evidence. But even so, I am at a loss to understand how the California Supreme Court unreasonably applied any United States Supreme Court precedent. The pre-crime/post-crime mitigation evidence dichotomy offered by the majority is the majority's own untenable invention – not that of the United States Supreme Court. AEDPA commands we show more respect for our counterparts in the California judiciary. We do not have the right to ignore AEDPA, however much our personal sense of justice urges us to over-turn Payton's sentence. We are not Congress. We are not the United States Supreme Court.

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1. The seven judges of the Ninth Circuit who reviewed Payton's claim of constitutional error *de novo* consist of the five dissenting judges in the initial en banc opinion (Judges Tallman, Kozinski, Trott, Fernandez, and T.G. Nelson) and the two judges of the three judge panel (Judges Rymer and Gould).

App. A at 41. The dissent similarly found that the California Supreme Court's thorough analysis of the "context of the proceedings" "faithfully followed the dictates of *Boyde*, the most analogous Supreme Court case." App. A at 37. In the end, argued the dissent, "[t]he California Supreme Court is just as qualified as we are to distinguish and apply United States Supreme Court precedent. The majority's 'readiness to attribute error is inconsistent with the presumption that state courts know and follow the law.'" App. A at 41 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)).

REASONS FOR GRANTING THE WRIT

This Court's intervention is needed because the Ninth Circuit has so far departed from the acceptable and usual course of judicial proceedings. Last term, this Court remanded this case to the Ninth Circuit with instructions to reevaluate its initial en banc decision under the principles governing AEDPA. With no more than a few superficial changes and a citation to AEDPA, the Ninth Circuit issued a virtually identical opinion, again affirming the grant of habeas relief. By the same 6-5 vote, the Ninth Circuit held "objectively unreasonable" the legal conclusion of 12 judges — five justices of the California Supreme Court and seven judges of the Ninth Circuit — that, pursuant to *Boyde*, California's "catch-all" mitigation instruction is constitutional as applied to post-crime evidence in mitigation and that there was no reasonable likelihood Payton's jury understood the court's instructions as precluding his evidence in mitigation.

The Ninth Circuit continues to act as if there is no meaningful difference between the "unreasonable application" review under AEDPA and pre-AEDPA *de novo* review. This Court's recent *per curiam* decisions confirm that the courts of appeals need additional guidance concerning the scope of review under the AEDPA. *Yarborough v. Gentry*, 124 S. Ct. 1 (2003); *Early v. Packer*, 537 U.S. 3 (2002); *Visciotti*, 537 U.S.

19; *Mitchell v. Esparza*, 124 S. Ct. 7 (2003); see also *Lockyer v. Andrade*, 538 U.S. 63 (2003) (rejecting methodology used by Ninth Circuit in applying AEDPA). This Court's intervention is needed to provide guidance on the limits of a federal habeas court's ability to distinguish Supreme Court precedent to avoid reasonable state court decisions.

The Ninth Circuit's decision not only contravenes AEDPA, it contravenes this Court's decision in *Boyde* that California's "catch-all" mitigation instruction satisfies the Eighth Amendment because it permits a jury to consider "any other circumstance" which extenuates the gravity of the crime, not just circumstances related to the crime. The Ninth Circuit circumvented that decision by limiting *Boyde* to pre-crime character evidence in mitigation. It then compounded the error by imposing a duty on the State to rewrite its jury instruction to specifically instruct Payton's jury "that it must take his post-crime evidence into account in determining whether to impose a sentence of life or death." The Ninth Circuit's unduly constricted reading of *Boyde* and its imposition of an affirmative duty to instruct on post-crime mitigation evidence have the potential to undermine the validity of numerous California death sentences as well as the sentencing schemes in other jurisdictions that do not specifically call for pinpoint consideration of post-crime mitigation evidence or other specific categories of mitigation evidence. For this reason as well, the exercise of this Court's supervisory power is needed.

I.

THE EN BANC NINTH CIRCUIT FAILED TO ADHERE TO THE LIMITS CONGRESS IMPOSED, THROUGH AEDPA, ON FEDERAL HABEAS CORPUS REVIEW

Under the requirements of AEDPA, a federal court "shall not" grant a writ of habeas corpus to a state prisoner with

respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *Price v. Vincent*, 538 U.S. 634, 123 S. Ct. 1848 (2003). A state court decision constitutes an "unreasonable application" of this Court's precedent if the state court identifies the correct governing legal rule from this Court's jurisprudence but unreasonably applies it to the facts of a particular case. *Penry v. Johnson*, 532 U.S. 782, 792 (2001). It is now well settled that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. *Andrade*, 123 S. Ct. at 1174-75. Therefore, a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court decision applied clearly established federal law erroneously or incorrectly; for a grant of habeas corpus relief the state court decision must also be objectively unreasonable. *Andrade*, 123 S. Ct. at 1175.

This "highly deferential standard for evaluating state court rulings" demands that federal courts give state court decisions "the benefit of the doubt." *Visciotti*, 537 U.S. at 24; *Williams v. Taylor*, 529 U.S. 362, 404-13 (2000). In that regard, AEDPA modified the role of federal habeas courts to, inter alia, "ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

Although the Ninth Circuit en banc majority cited this precedent and labeled the California Supreme Court's decision "objectively unreasonable," its analysis demonstrates it did not adhere to the requirements of AEDPA but instead, again, substituted its own judgment. As noted by the dissent, even if the California Supreme Court were incorrect it was surely not "objectively unreasonable." App. A at 41. Indeed, a review of the Ninth Circuit's reasoning shows that, not only was the California Supreme Court reasonable, it was correct. Only by utterly disregarding the limits imposed by AEDPA could the Ninth Circuit have affirmed the grant of habeas relief.

A. The California Supreme Court Was Not "Objectively Unreasonable" In Holding That, Under *Boyde*, Factor (K) "Standing Alone" Satisfies The Eighth Amendment

The first basis upon which the en banc Ninth Circuit relied in finding the California Supreme Court's decision objectively unreasonable was the California Supreme Court's reliance on *Boyde* for the proposition that factor (k), on its face, satisfies the Eighth Amendment. The Ninth Circuit acknowledged that *Boyde* so held but concluded that *Boyde's* holding applies only to cases involving pre-crime evidence in mitigation. App. A at 13-15. But in drawing that distinction, the majority adopted the very argument this Court rejected in *Boyde*, namely, that California's "catch-all" mitigation instruction limits the jury's consideration of mitigation evidence to circumstances *related to the crime*. App. A at 15-17.

The central issue in *Boyde*, as in Payton's case, was whether the "catch-all" mitigation instruction limits the jury to consideration of mitigation evidence directly related to the crime in violation of the Eighth Amendment's requirement that a jury "consider and give effect to all relevant mitigation evidence" offered by the defendant. *Boyde*, 494 U.S. at 377-78. As noted by the dissent, this Court in *Boyde* emphatically rejected such a reading. App. A 33. *Boyde* held: "The instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstances *of the crime* which extenuates the gravity of the crime.' The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes background and character." *Boyde*, 494 U.S. at 382 (emphasis in original). Thus, this Court held that California's "catch-all" mitigation instruction was constitutional, on its face, because it permitted consideration of "any other circumstance" in mitigation when determining whether to impose the death penalty. *Id.* at 380-82.

The Ninth Circuit majority side-stepped *Boyde* by relying on *factual* differences immaterial to the holding and reasoning of *Boyde*, which applies equally to pre-crime and post-crime evidence in mitigation. First, nothing is excluded by the phrase "any other circumstance" — hence, under the "catch-all" mitigation instruction, any and all evidence in mitigation is subject to consideration when determining whether to impose the death penalty.

Second, as even the majority concedes, under *Boyde* the "catch-all" mitigation instruction permits consideration of character evidence, which is precisely what Payton presented. App. A at 16. As noted by the dissent from the initial en banc decision, "[o]nce one acknowledges, as the Supreme Court did in *Boyde*, that factor (k)'s text allows for consideration of evidence beyond the crime itself, there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths." App. C at 78.

"Extenuates the gravity of the crime" in simple terms means to make the defendant's conduct somehow less severe. The term "extenuate" is defined as "To lessen or attempt to lessen the magnitude or seriousness of, especially by providing partial excuses." *The American Heritage Dictionary of the English Language*, 4th ed. Boston: Houghton Mifflin, 2000. Thus, if the defendant presents evidence of a troubled childhood as in *Boyde* or redemption as in *Payton*, such evidence may lessen the magnitude of the crime because it suggests a basis for a sentence less than death. Accordingly, the California Supreme Court was more than reasonable in concluding that *Boyde's* holding that factor (k) is constitutionally adequate applies equally to pre-crime and post-crime evidence in mitigation, particularly when it relates to character.

Nor is there any merit to the other reasons posited by the Ninth Circuit for rejecting as unreasonable the California Supreme Court's application of *Boyde* to post-crime mitigating evidence. In limiting *Boyde's* holding that factor (k) is

constitutional to cases involving pre-crime evidence in mitigation, the Ninth Circuit pointed to the reference in *Boyde* to "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*." App. A at 15, citing *Boyde*, 494 U.S. at 382 (internal citations and quotation marks omitted) (emphasis in original). According to the Ninth Circuit, "whereas there may be no reason to doubt, in light of society's 'long held' views, that a jury would consider a defendant's pre-crime background in sentencing him, there is reason to doubt that a jury would similarly consider post-crime evidence of a defendant's religious conversion and good behavior in prison." App. A at 15-16.

However, an equally long held view is the significance of rehabilitation and remorse in determining the appropriate sentence. It is precisely this view upon which Eighth Amendment jurisprudence relies in requiring juries in capital cases to consider post-crime evidence in mitigation, such as remorse or good behavior in prison. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."); *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986) ("[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination."). Therefore, it was perfectly reasonable for the California Supreme Court to conclude that under factor (k), a jury would consider post-crime evidence of a defendant's religious conversion and good behavior in prison in determining whether the severity of the crime is extenuated.

Finally, even if the six judges of the Ninth Circuit correctly distinguished *Boyde* along the pre-crime/post-crime axis, that is

not the sole reasonable interpretation of that decision. Accordingly, the California Supreme Court's application of *Boyde* was not "objectively unreasonable," precluding relief in habeas corpus.

B. The California Supreme Court Was Not "Objectively Unreasonable" In Holding That, Under *Boyde*, The "Context Of The Proceedings" Did Not Give Rise to An Eighth Amendment Violation

The en banc Ninth Circuit further violated AEDPA and the principles of *Boyde* with its analysis of whether the factor (k) instruction, "in the context of the proceedings," violated the Eighth Amendment. In finding that the California Supreme Court unreasonably applied *Boyde* when it held that the prosecutor's incorrect argument did not undo the court's proper instructions, the Ninth Circuit ruled that *Boyde's* principle that arguments of counsel generally carry "less weight" than instructions from the court applies only when there is no objectionable argument by the prosecutor. App. A at 18 ("Key to the Court's reasoning was the fact that there was 'no objectionable prosecutorial argument.'"). The principle set forth by this Court in *Boyde*, however, did not turn on the correctness of the prosecutor's argument. *Boyde* expressly stated: "This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court." *Boyde*, 494 U.S. at 384-85.[2]

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2. Ironically, in a separate case, the Ninth Circuit held that the state court acted contrary to *Boyde* by considering the prosecution's *correct* statement of law in argument to the jury in determining whether there was a reasonable likelihood the jury misunderstood the instructions. *McNeil v. Middleton*, 344 F.3d 988, 994 (9th Cir. 2003), petition for certiorari to be filed

In a similar fashion, the majority reinterpreted the remaining factors which this Court in *Boyde* held, and the California Supreme Court agreed, made it even more improbable a jury would misunderstand California's "catch-all" mitigation instruction to preclude consideration of non-crime related evidence in mitigation. Thus, contrary to *Boyde*, the majority found that the trial court's additional instructions, which were also given in Boyde's trial, compounded the problem with the "catch-all" mitigation instruction. App. A at 20-24 n.13-15.

And the majority simply ignored the principle in *Boyde* that a jury would not readily interpret California's "catch-all" mitigation instruction to disregard the *only* evidence presented in mitigation, particularly when there is no objection to the introduction of the evidence. *Boyde*, 494 U.S. at 383-84. The California Supreme Court, however, recognized that:

> For the jury to have accepted a narrow view of factor (k) in this case would have meant disregarding all of defendant's mitigating evidence, since the testimony of his eight penalty phase witnesses was all directed to his religious conversion and consequent behavior in prison. Indeed, it would have meant disregarding virtually the entire penalty phase, since the testimony of the prosecution's two witnesses occupies only eleven pages of the transcript. We think it unlikely, however, as did the high court in *Boyde*, "that reasonable jurors would believe the court's instructions transformed all of [defendant's] 'favorable testimony into a virtual charade.'" (*Boyde*,

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sub nom. Middleton v. McNeil concurrently with the instant petition. In other words, under Ninth Circuit law, incorrect arguments by prosecutors can undo correct instructions (*Payton*), but correct arguments by prosecutors cannot save ambiguous instructions (*McNeil*).

> *supra*, 494 U.S. at p. 383 . . . .) The high court's observation is especially apt when the trial court, as here, has also instructed the jury to consider "all of the evidence which has been received during any part of the trial" in determining the penalty. (See *ibid.*)

App. F at 163. The California Supreme Court's application of *Boyde* is similar to that employed by this Court in *Buchanan v. Angelone*, 522 U.S. 269 (1998). Like the California Supreme Court, this Court in *Buchanan* found, under *Boyde*, that it was "not likely that the jury would disregard [two days of testimony of mitigation evidence] in making its decision, particularly given the instruction to consider 'all of the evidence.'" *Buchanan*, 522 U.S. at 278. The similar interpretations of the principles of *Boyde* confirms the California Supreme Court, if not correct, was at least reasonable in its application of *Boyde*. See *Price v. Vincent,* 123 S. Ct. at 1848.

In sum, in order to find the California Supreme Court's decision objectively unreasonable the en banc Ninth Circuit majority interpreted *Boyde* in a manner not only inconsistent with *Boyde* itself but also inconsistent with this Court's interpretation of *Boyde* in subsequent cases. The Ninth Circuit's opinion does not reflect a court giving the state court the benefit of the doubt or the judgment the full effect as required under the AEDPA. It is just the opposite. The Ninth Circuit's refusal to follow the dictates of AEDPA undermines the careful balance Congress struck when it enacted that law, between the state on the one hand, and the federal courts on the other. A writ of certiorari should therefore issue.

II.

THE NINTH CIRCUIT'S INTERPRETATION OF *BOYDE* ALSO JEOPARDIZES THE VALIDITY OF NUMEROUS OTHER DEATH SENTENCES AND SENTENCING SCHEMES WHICH DO NOT CALL FOR PINPOINT MITIGATION INSTRUCTIONS

The implications of the majority's decision extend far beyond the reversal of Payton's death penalty. The decision jeopardizes the validity of numerous death penalty cases in California in which the defendant relied, at least in part, on post-crime mitigation evidence and the jury was instructed with this same "catch-all" mitigation instruction. See, e.g., *People v. Brown*, 45 Cal. 3d 1247, 1252-56, 756 P.2d 204, 248 Cal. Rptr. 817 (1998) (defendant remorseful and no threat in custody because only threat to women); *People v. Gates*, 43 Cal. 3d 1168, 1197, 1199-1200, 743 P.2d 301, 240 Cal. Rptr. 666 (1987) (good prisoner), *cert. denied*, 486 U.S. 1027 (1988); *People v. Mincey*, 2 Cal. 4th 408, 472, 827 P.2d 388, 6 Cal. Rptr. 2d 822 (1992); *People v. Hernandez*, 47 Cal. 3d 315, 355, 365-66, 763 P.2d 1289, 253 Cal. Rptr. 199 (1988) (difficulty of life in prison), *cert. denied*, 491 U.S. 910 (1989); *People v. Gonzalez,* 51 Cal. 3d 1179, 1204, 1225, 800 P.2d 1159, 275 Cal. Rptr. 729 (1990); *People v. Jones*, 53 Cal. 3d 1115, 1128, 1146, 811 P.2d 757, 282 Cal. Rptr. 465 (1991) (good prisoner). Most recently, in *Belmontes v. Woodford*, 350 F.3d 861 (Nov. 20, 2003 [9th Cir. 2003]), the Ninth Circuit again limited *Boyde's* holding to cases involving only pre-crime evidence in mitigation and reversed another death penalty because the "catch-all" mitigation instruction did not allow for consideration of Belmontes' post-crime evidence in mitigation. *Id.* at 901-02, 904.

The Ninth Circuit's limitation of *Boyde* further jeopardizes other California death judgments because the Ninth Circuit uses it as a basis for ordering California trial courts to rewrite its jury instructions to call for pinpoint consideration of a defendant's specific category of mitigation evidence. As such, the Ninth Circuit's order to instruct Payton's jury "that it must take his post-crime mitigation evidence into account in determining whether to impose a sentence of life or death" not only contravenes *Boyde's* holding that factor (k) permits consideration of such non-crime related mitigation evidence, but it also runs contrary to this Court's precedent providing that "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigation evidence." *Buchanan*, 522 U.S. at 276. In *Buchanan*, this Court noted: "we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." *Id.* at 276.

The Ninth Circuit's decision also has potential consequences beyond California, as did *Boyde* itself, and could undermine sentencing schemes in other jurisdictions that do not specifically call for pinpoint consideration of post-crime mitigation evidence or other specific categories of mitigation evidence. This Court's intervention and guidance is warranted and urgently needed.

CONCLUSION

The petition for certiorari should be granted.

Dated: January 13, 2004

Respectfully submitted,

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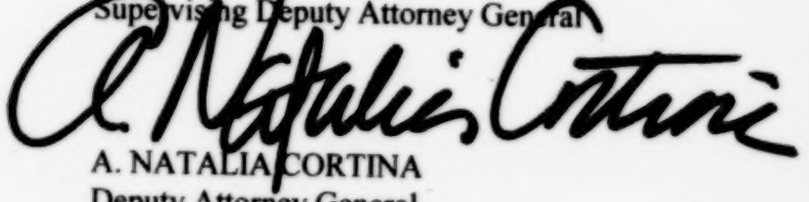

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APPENDIX A

APPENDIX A

[Filed October 20, 2003]

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM CHARLES PAYTON, *Petitioner-Appellee*, v. JEANNE WOODFORD, Warden, *Respondent-Appellant.*	No. 00-99000 D.C. No.. CV-94-04779-R

WILLIAM CHARLES PAYTON, *Petitioner-Appellee*, v. JEANNE WOODFORD, Warden, *Respondent-Appellant.*	No. 00-99003 D.C. No. CV-94-04779-R

On Remand from the United States Supreme Court

Filed October 20, 2003

Before: Mary M. Schroeder, Chief Judge, Harry Pregerson, Alex Kozinski, Stephen S. Trott, Ferdinand F. Fernandez, Thomas G. Nelson, A. Wallace Tashima, William A. Fletcher, Richard A. Paez, Marsha S. Berzon and Richard C. Tallman, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Tallman

COUNSEL

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Frederick R. Millar, Jr., Deputy Attorney General, A. Natasha Cortina, Deputy Attorney General, Nancy L. Palmieri, Deputy Attorney, General, Esteban Hernandez, Deputy Attorney General, San Diego, California, for respondent-appellant Jeanne S. Woodford.

Maria E. Stratton, Federal Public Defender, Dean R. Gits, Deputy Federal Public Defender, Office of the Federal Public Defender, Los Angeles, California, and Rosalie L. Rakoff, A Professional Corporation, Santa Monica, California, for petitioner-appellee William Charles Payton.

OPINION

PAEZ, Circuit Judge:

A California jury convicted William Charles Payton ("Payton") of the first degree murder and rape of Pamela Montgomery and the attempted murder of Patricia Pensinger and her son, Blaine Pensinger. Payton was sentenced to death. Payton appealed both his underlying conviction and death sentence.

On direct appeal, the California Supreme Court affirmed both his conviction and his sentence. *People v. Payton*, 839 P.2d 1035 (Cal. 1992). Payton filed a petition for a writ of habeas corpus and a subsequent amended habeas petition in federal district court, pursuant to 28 U.S.C. § 2254, after exhausting his state court remedies. Payton raised several

arguments in his habeas petition relating to the guilt and penalty phases of his trial. At issue here is Payton's contention that the jury did not consider, in imposing the death penalty, potentially mitigating evidence of his post-crime religious conversion and good behavior in prison. The California death penalty statute contains an eleven-factor test that requires the jury to weigh and balance specific aggravating and mitigating circumstances in deciding whether to impose the death penalty. The first ten factors instruct the judge or jury to evaluate various circumstances specific to the crime and to account for the defendant's age and prior convictions. The eleventh factor—factor (k)—functions as a catchall factor, enabling the judge or jury to consider any other circumstance that the defendant presents in mitigation of a death sentence. During Payton's penalty phase, the trial court used the then-existing model jury instruction that incorporated this multi-factor test. *See* 1 California Jury Instructions, Criminal ("CALJIC") 8.84.1 (4th ed. 1979). This instruction simply quotes factor (k) as it exists in the death penalty statute, directing the jury to consider any circumstance "which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Id.*; Cal. Penal Code § 190.3 (1978). Payton contended that, although the jury instruction enabled the jury to consider pre-crime character and background evidence, *see Boyde v. California*, 494 U.S. 370 (1990), it limited the permissible scope of factor (k) in such a way as to remove from the jury's consideration the only mitigating evidence he presented during the penalty phase of his trial—evidence of his post-crime religious conversion and good behavior in prison.

The district court rejected Payton's guilt phase arguments but agreed with his penalty phase arguments. The court therefore granted Payton's habeas petition and vacated his death sentence. A three-judge panel of this court, however, disagreed that Payton's penalty phase was fundamentally unfair, reversed the district court, and ordered the writ vacated. *Payton v.*

Woodford, 258 F.3d 905 (9th Cir. 2001). We then took this case en banc, adopted the three-judge panel's decision that there were no guilt phase errors, but affirmed the district court's decision with respect to the penalty phase. We agreed with the district court that there was error during Payton's penalty phase, and we affirmed the grant of Payton's habeas petition. *Payton v. Woodford* ("*Payton I*"), 299 F.3d 815 (9th Cir. 2002) (en banc).

In our initial en banc opinion, we held that the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218 (April 24, 1996) ("AEDPA"), did not apply to our analysis of Payton's habeas claims because Payton filed his petition for the appointment of habeas counsel prior to April 24, 1996, the effective date of AEDPA. *See Payton*, 299 F.3d at 822. In reaching this conclusion, we relied on our prior decision in *Calderon v. United States District Court ("Kelly")*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc), in which we held that a petition for appointment of habeas counsel coupled with a motion for a stay of execution was sufficient for fixing the date for determining when AEDPA applies. After *Payton I*, the Supreme Court issued its decision in *Woodford v. Garceau*, 123 S. Ct. 1398, 1402-03 (2003), in which it held that cases are "pending" before the effective date of AEDPA only if a habeas petitioner has filed an "actual application for habeas corpus relief" in district court; a petition for the appointment of habeas counsel is not enough. In light of its decision in *Woodford v. Garceau*, the Supreme Court granted a writ of certiorari in *Payton I*, vacated the judgment, and remanded the case to us for further consideration. *See Woodford v. Payton*, 123 S. Ct. 1785 (2003).

This opinion ("*Payton II*") reflects our decision on remand.[1] Here, we apply the strict AEDPA standard to our

[1]In this opinion, as in our prior en banc opinion, we address only Payton's habeas claims relating to the penalty phase of his trial. Payton raised several challenges to the guilt phase of his trial and contested his underlying conviction. The district court found no constitutional error in his conviction. In appeal No. 00-99003, Payton challenges the district court's rulings rejecting his claims of ineffective assistance of counsel, prosecutorial misconduct during the guilt phase of the trial, and the cumulative effects of the alleged constitutional errors. The panel affirmed the district court's rulings on these issues, as do we. We adopt the panel's reasoning on the guilt phase issues as our own. *See Payton*, 258 F.3d at 919-25.

analysis of Payton's habeas claims and conclude, as we did in *Payton I*, that the district court properly granted Payton's habeas petition.

BACKGROUND INFORMATION[2]

In 1980, while spending the night at Patricia Pensinger's home, Payton raped Pamela Montgomery and stabbed her to death. He then entered the bedroom of Pensinger and her son Blaine, stabbed each of them repeatedly, and fled. Payton was charged with the first degree murder and rape of Montgomery and the attempted murders of Pensinger and her son.

At the guilt phase of Payton's jury trial, the prosecution presented testimony from the law enforcement officers who observed the crime scene, forensics experts who confirmed that saliva and semen samples taken from Montgomery's body were consistent with Payton's, Patricia and Blaine Pensinger who gave victims' accounts of the attacks, Payton's wife, who stated

[2]We summarize the pertinent facts only briefly. The facts surrounding Payton's conviction are set forth in detail in the opinions of the panel and the California Supreme Court. *Payton*, 258 F.3d at 910-14; *Payton*, 839 P.2d at 1039-40.

that soon after the attacks she saw blood on Payton's clothes, face, hands and penis as well as fingernail scratches and digs on his legs and back, and a fellow inmate, Alejandro Garcia, who recounted that Payton admitted that he raped and stabbed Montgomery and stabbed the Pensingers because he "had this urge to kill." The defense called no witnesses, and the jury convicted on all counts.

During the penalty phase, the prosecution presented as a witness a fellow inmate who testified to his jailhouse conversations with Payton in which Payton admitted that he had "severe problems with sex and women," that he wanted to "stab them and rape them," and that every "wom[a]n on the street he [saw] was a potential victim, regardless of age or looks." Payton's former girlfriend related that she had once awakened to find Payton holding a kitchen knife to her neck, and that he had stabbed her chest and arms. After she pushed him off, he stayed with her and held a towel around her bleeding arm until the police arrived.

The defense presented eight witnesses, including Payton's pastor, a deputy sheriff, four inmates, his mother, and the director of a religious organization ministering to prisoners. Their testimony, taken as a whole, tended to show that Payton had been "born again," made a sincere commitment to God, and was performing good works in jail.

Payton's pastor testified that in his opinion, Payton's conversion was credible and that he was "sincere in his statement and commitment to the Lord." The director of a religious outreach organization ministering to prisoners testified to her numerous conversations with Payton about his spiritual commitment and its manifestation in the bible study groups he established with other inmates. She described his conversion of other inmates, his admission to a correspondence bible college, and his writings.

Four inmates testified that they believed that Payton's religious conversion was sincere and that he had a calming influence on other inmates. One testified that Payton's intervention prevented him from committing suicide. A deputy sheriff assigned to Payton's jail facility related that Payton led prayer meetings and had a positive influence on other inmates. Payton's mother described praying together with her son and discussing religion on a weekly basis. Asked if she had noticed a change in her son, she responded: "Oh, yes . . . . He's totally immersed in the Lord . . . . He's an instrument of the Lord as far as he's concerned."

Prior to closing arguments in the penalty phase, the judge held an in-chambers conference with the attorneys about the jury instructions. They discussed the application of the multifactor CALJIC instruction (No. 8.84.1) that guides the jury in determining whether to impose a sentence of life imprisonment or death.[3] Factor (k), the eleventh and final

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[3]The instruction provided in full:

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or

violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [*sic*] of intoxication.

(i) The age of the defendant at the time of the crime.

factor, directed that the jury consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CALJIC 8.84.1. Payton's counsel sought an amendment to the instruction that expressly would have directed the jury to consider "evidence of the defendant's character, background, history, mental condition and physical condition."[4] Although the trial judge agreed with the defense counsel's interpretation of factor (k), he declined the request because he was reluctant to alter the instruction insofar as it reflected verbatim the text of California Penal Code § 190.3. He stated that he would allow counsel to argue the point. The judge also denied defense counsel's separate proposal to amend the instruction to permit the jury to consider Payton's "potential for rehabilitation."

During closing argument, the prosecutor argued to the jury that factor (k) applied to "some factor at the time of the offense

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CALJIC 8.84.1. In his instructions to the jury, the trial judge omitted the bracketed word "each" and retained the bracketed phrase "except as you may be hereafter instructed."

[4]The proposed amendment read: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, including evidence of the defendant's character, background, history, mental condition and physical condition."

that somehow operates to reduce the gravity for what the defendant did" but that it did not "refer to anything after the fact or later." He asserted that factor (k) did not encompass Payton's conversion to Christianity and good conduct in jail because they occurred "well after the fact of the crime," and the factor "seems to refer to a fact in operation at the time of the offense." At one point, the prosecutor said:

> What I am getting at, you have not heard during the past few days any legal evidence of mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial.

Concluding, the prosecutor told the jury that he did not "want to spend too much time on [Payton's religious conversion] because I don't think it's really applicable and I don't think it comes under any of the eleven factors."

In response to the prosecutor's factor (k) argument, the defense moved for a mistrial, objecting that the prosecutor's argument was "completely contrary to what we all agreed in chambers on the record 'k' was designed to apply to." The court responded that it was a "fair comment on either side" and "I think you can argue it either way." The court told the jury that "the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective."

Defense counsel's closing argument acknowledged that factor (k) "may be awkwardly worded." He argued that the factor was designed as a catch-all to include the kind of evidence in mitigation he had presented, and that, for Payton, it was the most critical of the factors.

After the closing arguments, the judge instructed the jury as noted above. Upon receiving instructions that it must reach a unanimous result, the jury retired to deliberate. The jury returned a verdict of death.

DISCUSSION

I.

[1] Payton filed his habeas petition on May 6, 1996, after the effective date of AEDPA. In light of *Woodford v. Garceau*, 123 S. Ct. at 1402, AEDPA therefore applies to our analysis of Payton's habeas claims.

[2] The California Supreme Court, in a published opinion, addressed the merits of Payton's factor (k) claims[5] and concluded that there was no instructional error at trial. *See Payton*, 839 P.2d at 1049. According to AEDPA, we must determine whether the California Supreme Court's adjudication of these claims either (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,[6] as determined by the Supreme Court

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[5]After *Payton*, the California Supreme Court decided *People v. Easley*, 671 P.2d 813, 826 n.10 (Cal. 1983), in which it held that trial courts should inform the jury that factor (k) includes any mitigating background and character evidence that the defendant presents in his or her defense. In light of *Easley*, the factor (k) instruction was amended to ensure that the jury consider "any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." *See* CALJIC 8.85(k) (6th ed. 1996). We refer to the factor (k) instruction as it existed prior to this amendment as "unadorned."

[6]"Clearly established" federal law refers to "the

of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2). The "unreasonable application" prong, which guides our analysis here, "permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 123 S. Ct. 2527, 2534-35 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). "In other words, a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.' " *Id.* at 2535 (quoting *Lockyer*, 123 S. Ct. at 1175).

"Unreasonable application" means that the state court's application of clearly established Supreme Court precedent was "objectively unreasonable." *Id.*; *see also Lockyer*, 123 S. Ct. at 1175.

We hold that the California Supreme Court unreasonably applied "clearly established" Supreme Court precedent to the facts of this case.

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governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 123 S. Ct. 1166, 1172 (2003). "While Supreme Court precedent is the only authority that is controlling under AEDPA, we look to Ninth Circuit case law as 'persuasive authority for purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law.' " *Davis v. Woodford*, 333 F.3d 982, 990-91 (9th Cir. 2003) (quoting *Luna v. Cambra*, 306 F.3d 954, 960 (9th Cir.), *amended by* 311 F.3d 928 (9th Cir. 2002)) (internal quotation marks omitted).

A. Controlling Supreme Court Precedent

[3] "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); *see also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986). That is, the Eighth and Fourteenth Amendments require "individualized consideration of mitigating factors" in capital cases. *Lockett*, 438 U.S. at 606; *see also Penry v. Lynaugh*, 492 U.S. 302, 317 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Eddings*, 455 U.S. at 112. "Relevant mitigating evidence" includes evidence about a defendant's likely future behavior in prison. *See Skipper*, 476 U.S. at 7 ("A defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.").

[4] Supreme Court precedent in force at the time the California Supreme Court decided Payton's factor (k) arguments required that *all* potentially relevant mitigating evidence—pre-crime *and* post-crime—be available to the sentencer in a capital case. "Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. *The sentencer must also be able to consider and give effect to that evidence in imposing sentence*." *Penry*, 492 U.S. at 319 (emphasis added).

The Supreme Court had occasion to analyze the factor (k) instruction at issue here in *Boyde v. California*, 494 U.S. 370 (1990). Specifically, the Court addressed "whether petitioner's capital sentencing proceedings violated the Eighth Amendment

because the trial court instructed the jury in accordance with former CALJIC 8.84.1, including the 'unadorned' factor (k)." 494 U.S. at 377. Boyde contended that factor (k) did not allow the jury to consider and give effect to non-crime-related mitigating evidence, such as his impoverished and deprived childhood and difficulties in school, because the instruction limited the jury to considering only evidence related to the crime. *Id.* at 378, 381. The Court established a standard for reviewing jury instructions that allegedly are "ambiguous and therefore subject to an erroneous interpretation"—"whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380. Applying this standard to factor (k), "standing alone," the Court concluded that "there is not a reasonable likelihood that Boyde's jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character."[7] *Id.* at 381, 386.

B. The California Supreme Court's Application of Controlling Supreme Court Precedent

The California Supreme Court addressed Payton's argument that "the trial court's instructions and the prosecutor's argument led the jurors to believe, incorrectly, that they were not permitted to consider [his] mitigating evidence." 839 P.2d at 1047. The court acknowledged the teachings of *Eddings*,

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[7]We note that in *Boyde* the trial court explicitly instructed the jury to consider "*any other circumstance* which extenuates the gravity of the crime" and defined "extenuate" as "to lessen the seriousness of a crime as by giving an excuse." 494 U.S. at 381, 382 n.5 (emphasis added). The Court concluded that the jury would "naturally consider" mitigating character and background evidence as "any other circumstance" that might provide such an "excuse." *Id.* at 382 n.5.

Lockett, and *Skipper* that the Eighth Amendment requires the sentencer in a capital case to consider evidence of character and background, including "good behavior in prison." *Id.* at 1070. In analyzing Payton's claims, however, it focused entirely on the Supreme Court's decision in *Boyde*, *id.* at 1070-73, which was an unreasonable application of "clearly established" Supreme Court precedent because *Boyde* does not control this case and, in focusing almost exclusively on *Boyde*, the court did not give proper effect to clearly established Supreme Court cases such as *Skipper* and *Penry* that are controlling here.

Boyde does not control this case for several reasons. First, this case concerns *post-crime* mitigating evidence such as the evidence the Supreme Court considered in *Skipper*.[8] *Boyde*, however, addressed whether there was a reasonable likelihood that the jury applied factor (k) in a way that prevented it from considering *pre-crime* background evidence. The Court relied on "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*." *Id.* at 382 (quoting *Penry*, 492 U.S. at 319) (emphasis in original; internal quotation marks omitted). It saw "no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence less than death." *Id.* Whereas there may be no reason to doubt, in light of society's "long held" views, that a jury would consider a defendant's pre-crime background in sentencing him, there is reason to doubt that a

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[8]Payton's religious conversion was not merely an overnight occurrence. Indeed, a year and nine months elapsed from the date of the crime to the date of Payton's death sentence, during which time Payton's conversion and religious good works took place.

jury would similarly consider post-crime evidence of a defendant's religious conversion and good behavior in prison.[9]

[5] *Boyde* did not address the question presented here—whether, on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to *post-crime* evidence.[10] Indeed, the Court explicitly distinguished the character and background evidence at issue there from evidence that "pertain[s] to prison behavior after the crime for which [the petitioner] was sentenced to death, as was the case in *Skipper*." *Boyde*, 494 U.S. at 382 n.5. Any natural reading of the words of the unadorned factor (k) does not support the inclusion of

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[9]Indeed, as Justice Kennard noted in her dissent in *People v. Payton*:

> Unlike evidence of a disadvantaged background, [post-crime] evidence does not fit neatly, if it fits at all, into factor (k), because it is not an "excuse" for the commission of the crime. Thus, the jurors in this case were more likely to be misled when they attempted to apply former CALJIC No. 8.84.1 than were the jurors who evaluated the "disadvantaged background" evidence presented by the defendant in *Boyde*.

839 P.2d at 1057.

[10]In *Babbitt v. Calderon*, 151 F.3d 1170, 1178-79 (9th Cir. 1998), we addressed the application of the factor (k) instruction to evidence of Babbitt's background, character, and history. We noted the holding in *Boyde* that the unadorned factor (k) instruction did not preclude consideration of Boyde's character and background. *Babbitt*, like *Boyde*, however, did not address the applicability of the factor (k) instruction to post-crime mitigating evidence such as Payton's.

post-crime evidence because mitigation evidence occurring after a crime cannot possibly "extenuate the gravity of the crime." *Boyde*'s conclusions about the plain wording of factor (k) and the instruction's obvious inclusion of pre-crime background evidence therefore do not apply in this case.

Second, in *Boyde*, the Court rejected Boyde's argument that the prosecutor's comments at sentencing "reinforced an impermissible interpretation of factor (k)" suggesting to the jury that it could not consider Boyde's mitigating character and background evidence. *Id.* at 384-85. The Court reasoned that the prosecutor's arguments "are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates." *Id.* at 384. In addition, "[a]rguments of counsel which misstate the law are subject to objection and correction by the court." *Id.* Key to the Court's reasoning was the fact that there was "no objectionable prosecutorial argument." Indeed, the prosecutor never suggested to the jury that it could not consider mitigating evidence of Boyde's character and background. *Id.* at 385. The prosecutor "*explicitly assumed* that petitioner's character evidence was a proper factor in the weighing process." *Id.* (emphasis added).

Whereas the prosecutor in *Boyde* conceded that the jury must consider Boyde's mitigating character and background evidence, the prosecutor here repeatedly stated to the jury that factor (k) did *not* encompass Payton's mitigating evidence of his religious conversion and good behavior in prison.[11] For

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[11]The California Supreme Court evaluated the impact of the prosecutor's comments on the jury on the basis of only *one* of his comments. The court failed to consider the cumulative impact on the jury of all the prosecutor's comments regarding factor (k) and Payton's post-crime mitigating evidence.

example, after listing the eleven factors in CALJIC 8.84.1, the prosecutor gave his interpretation of factor (k) to the jury:

> 'K' says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact . . . some factor *at the time of the offense* that somehow operates to reduce the gravity for what the defendant did. *It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.* (emphasis added)

After the court overruled the defense attorney's objection to the legal misstatements in the prosecutor's argument, the prosecutor continued arguing to the jury:

> Referring back to 'K' which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with Defendant's new Christianity and that he helped the module deputies in the jail while he was in custody. *The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.* [The defense] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when — under any other circumstance which extenuates or lessens the gravity of the crime, refers — seems to refer to a fact in operation *at the time of the offense.* What I am getting at, *you have not heard during the past few days any legal evidence [of] mitigation.* What you've heard is just some jailhouse evidence to win your sympathy, and that's all. *You have not heard any evidence of mitigation in this trial.* (emphasis added)

He then specifically told the jury that it had not "heard anything to mitigate what [Payton's] done" and that Payton's *only* mitigating evidence did not fit into factor (k):

> I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because *I don't think it's really applicable and I don't think it comes under any of the eleven factors.* . . . (emphasis added)[12]

Indeed, the prosecutor focused the jury's attention on the eleven CALJIC factors, which he argued did not encompass Payton's mitigating evidence:

> You shall consider, take into account and be guided by the applicable *factors* of aggravating and mitigating circumstances upon which you have been instructed. In other words, the *factors* I have just read to you.
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> ****
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> The jury is expected or supposed to go through a weighing process of the *factors* I have just described. (emphasis added)

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[12]We note that the prosecutor's statement appears directly to contradict the California Supreme Court's determination that "the prosecutor implicitly conceded the relevance of defendant's mitigating evidence by devoting substantial attention to it." 839 P.2d at 1049.

The California Supreme Court recognized that the prosecutor "suggested a narrow and incorrect interpretation of factor (k)," but it reasoned that "[a]ny impact this argument may have had . . . was immediately blunted by defense counsel's objection, which led the court to remind the jury that lawyers' comments were 'not evidence' but 'argument,' and to be placed in [their] proper perspective.' "[13] 839 P.2d at 1048. This was an unreasonable application of *Boyde*.[14]

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[13]The Supreme Court reiterated in *Boyde* the well-established principle that the statements of attorneys "are usually billed in advance to the jury as matters of argument . . . and as the statements of advocates." 494 U.S. at 384. Moreover, the "arguments of counsel generally carry less weight with a jury than do instructions from the court." *Id.* It was an unreasonable application of *Boyde* for the California Supreme Court to assume that the jury, which received instructions that both attorneys' statements were merely argument and not evidence, would accord more weight to defense counsel's argument, containing correct statements of the law with respect to factor (k), such as to "blunt" the effect of the prosecutor's legal misstatements about factor (k). *See Payton*, 839 P.2d at 1048-49. According to *Boyde*, only instructions by the court have the force to "blunt" attorneys' comments. Here, however, the trial court provided no clarifying instructions as to the proper scope of factor (k) to "blunt" the prosecutor's legally erroneous statements.

[14]The court reasoned that it was unlikely that "reasonable jurors would believe the court's instructions transformed all of [defendant's] favorable testimony into a virtual charade." 839 P.2d at 1049 (quoting *Boyde*, 494 U.S. at 383) (internal quotation marks omitted; alteration in original). In *Boyde*, however, the jury received only an ambiguous factor (k) instruction. Here, in contrast, the jury received not only an ambiguous factor (k) instruction, but also explicit, repeated

According to *Boyde*, "the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made." 494 U.S. at 385. In *Boyde*, the factor (k) instruction potentially was ambiguous but the prosecutor correctly stated in his argument that the jury must consider Boyde's mitigating character and background evidence, thus clarifying the scope of the instruction. Here, however, the jury was confronted with an ambiguous factor (k) instruction and with post-crime mitigating evidence that, unlike the pre-crime character and background evidence in *Boyde*, did not fit clearly within the plain wording of the instruction. On top of this, the court explicitly authorized the prosecutor to argue that Payton's post-crime mitigating evidence could not be considered under factor (k), overruled defense counsel's objection to the prosecutor's legal misstatements, and failed to instruct the jury that it must consider and give effect to Payton's post-crime mitigating evidence.[15] This is not a case in which the prosecutor

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arguments by the prosecutor that the defense had presented no mitigating evidence and that post-crime mitigating evidence does not fit into factor (k). This, coupled with the court's instruction, *see infra*, that the jury consider the arguments of counsel, calls into doubt the court's apparent certainty that the jury did not ignore Payton's mitigating evidence.

[15]Defense counsel stated: "My only problem is I think we all agree that that's the law [that factor (k) includes Payton's post-crime mitigating evidence], but the jury's not going to know." The judge replied, "I agree with you." The judge then stated: "I see your position for the edification and clarification of the jury. But I'm going to refuse, as I said, to modify the [factor (k)] instruction . . . I assume *you gentlemen* . . . in your *argument* can certainly relate — relate back to those factors and certainly can argue the defendant's character, background, history, mental condition, physical condition; certainly fall into category 'k' and certainly make a clear argument to the jury."

(emphasis added) The court also instructed the jury to weigh the CALJIC factors, but never explicitly clarified that the jury could consider Payton's post-crime mitigating evidence under factor (k) even though the court agreed with defense counsel that factor (k) encompassed this evidence:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, *except as you may be hereafter instructed*. You shall consider, take into account and be guided by the following *factors*, if applicable [lists (a) through (k)].
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> ***
>
> After having heard all of the evidence and after having heard *and considered the argument of counsel*, you shall consider, take into account and be guided by the applicable *factors* of aggravating and mitigating circumstances upon which you have been instructed.
> (emphasis added)

As Justice Kennard pointed out in her dissent in *People v. Payton*:

> The court's statement to the jury that its considerations of "all of the evidence" should be guided by "the arguments of counsel" and "the applicable factors of aggravating and mitigating circumstances," was tantamount to an instruction to the jury that its power to consider the evidence was not unlimited. This instruction

made an offhand remark during the course of trial. The prosecutor's erroneous argument was far from subtle. It was explicit, deliberate, consistent, and repeated. Indeed, the jury was presented with the prosecutor's and the defense attorney's conflicting arguments about whether it legally could consider Payton's mitigating evidence under factor (k),[16] and the court left it up to the *jury* to choose which version of the law to apply. When the court expressly permits counsel to argue the legal meaning of an instruction, without ever instructing the jury which interpretation is correct, the arguments of counsel obviously take on significant importance. A lay jury is ill-equipped to determine which view of the law is correct.[17]

> could only strengthen the prosecutor's erroneous and repeated argument to the jury that it could not legally consider defendant's mitigating evidence, and the jury may well have acted accordingly.

839 P.2d at 1058.

[16]Because a natural reading of the unadorned factor (k) instruction already favored the prosecutor's interpretation, defense counsel faced a prodigious hurdle in trying to convince the jury of the proper interpretation.

[17]As the dissent noted in *People v. Payton*:

> The trial court's ruling was wrong. The proper scope of factor (k) is a question of *law*, not of fact. It is the trial court's duty to explain the law to the jury, not to place upon the jury the impossible burden of deciding which of two inconsistent views of the law is correct. The jurors in this case were laypersons; presumably they were unfamiliar with the legislative history of factor (k) or with cases interpreting the Eighth

See Griffin v. United States, 502 U.S. 46, 59 (1991) ("When . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."); *Penry*, 492 U.S. at 328 (" 'When the choice is between life and death, that risk [that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.' " (quoting *Lockett*, 438 U.S. at 605)).

[6] In this context, there was a reasonable likelihood that, as a result of the prosecutor's legally erroneous arguments and the court's failure to correct the arguments with proper jury instructions, the jury did not consider and give effect to the post-crime mitigating evidence of Payton's religious conversion and good behavior in prison. This was constitutional error. *See Penry*, 492 U.S. at 326 (reversing a death sentence and remanding for resentencing because, on the basis of the prosecutor's argument and the absence of appropriate jury instructions, "a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence"); *Skipper*, 476 U.S. at 5 (holding that post-crime evidence that a defendant would not pose a danger in prison "must be considered potentially mitigating" and "may not be excluded from the sentencer's consideration"); *Eddings*, 455 U.S. at 114-15 (holding that the sentencer in a capital case

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> Amendment. Thus, they were totally unequipped to decide whether the prosecutor or defense counsel had correctly explained to them which evidence they were entitled to consider in deciding whether defendant should live or die.

839 P.2d at 1057.

may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence" and may not give such evidence "no weight"); *Lockett*, 438 U.S. at 608 (striking down Ohio's death penalty statute as violating the Eighth and Fourteenth Amendments due to its "limited range of mitigating circumstances which may be considered by the sentencer" and its preclusion from consideration of other relevant mitigating factors). The California Supreme Court's conclusion to the contrary, on the basis of *Boyde*, which did not address improper legal argument by a prosecutor or a court's failure to provide jury instructions to correct the attorney's legally erroneous argument, was an unreasonable application of "clearly established" Supreme Court precedent. When the effect of a mitigation instruction, viewed in the full context of the trial, is to confuse or mislead the jury in its duty to consider all relevant mitigation evidence, there has been constitutional error.

II.

In light of our conclusion that there was constitutional error, we must now decide whether this error was harmless. We hold that the error was not harmless because it had a "substantial and injurious effect or influence" on the jury's verdict, *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), and we are left with "grave doubt" as to the harmlessness of the error, *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

As an initial matter, we note that our caselaw is not clear as to whether the petitioner, the state, or neither, bears responsibility for demonstrating the significance of the error under the *Brecht/O'Neal* harmlessness standard. *Compare Rodriguez v. Marshall*, 125 F.3d 739, 744 (9th Cir. 1997) (stating that petitioner bears the burden of showing harm); *Franklin v. Henry*, 122 F.3d 1270, 1273 (9th Cir. 1997) (same); *with Keating v. Hood*, 191 F.3d 1053, 1062 (9th Cir. 1999) (as amended) (noting that the state bears the burden of showing

harmlessness); *Fisher v. Roe*, 263 F.3d 906, 917 (9th Cir. 2001) (same); *and with Mancuso v. Olivarez*, 292 F.3d 939, 949 n.4 (9th Cir. 2002) (as amended) (attempting to clarify the inconsistency in our caselaw regarding burdens of proof and concluding that "the reviewing court must determine independently whether a trial error had a substantial and injurious effect, without consideration of burdens of proof"); *Thompson v. Borg*, 74 F.3d 1571, 1575 (9th Cir. 1996) (rejecting burdens of proof in favor of an independent determination of whether a trial error had a substantial and injurious effect).

It is clear from *O'Neal* that the petitioner does not bear the burden of showing harm. 513 U.S. at 436 ("[W]e note that we deliberately phrase the issue in this case in terms of a *judge's* grave doubt, instead of in terms of 'burden of proof.' ") (emphasis added). Because the harmless error analysis is a purely legal question that lies outside the realm of factfinding, we dispense with burdens of proof and presumptions. *See id.* at 437 (explaining that the court must determine whether the error affected the judgment "without benefit of such aids as presumptions or allocated burdens of proof that expedite fact-finding at the trial" (quoting R. Traynor, The Riddle of Harmless Error 26 (1970)). *O'Neal* directs us to ask a "conceptually clearer" question in reviewing the record in a habeas case: " 'Do I, the judge, think that the error substantially influenced the jury's decision?' " *Id.* at 436.

[7] In asking this question, we step back to determine where we are on the spectrum of certainty about the harmlessness of the constitutional error. If we are convinced that "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *Id.* at 437 (quoting *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)). If, on the other hand, we are not fairly assured that there was no effect on the verdict, we must reverse. *Id.* In the

"narrow circumstance" in which we are in "grave doubt" as to the effect of the constitutional error, we must assume that there was such an effect, and grant the petition. *O'Neal*, 513 U.S. at 436, 438; *see also Thompson*, 74 F.3d at 1575.

[8] In the course of this inquiry, it is the State that bears the "risk of doubt." *O'Neal*, 513 U.S. at 438; *Valerio v. Crawford*, 306 F.3d 742, 762 (9th Cir. 2002) (en banc), *cert. denied*, 123 S. Ct. 1788 (2003). We look to the State to instill in us a "fair assurance" that there was no effect on the verdict. *See Morales v. Woodford*, 336 F.3d 1136, 1148 (9th Cir. 2003) ("[T]he state must provide us with a 'fair assurance' that the error was harmless under *Brecht*."); *Valerio*, 306 F.3d at 762; *see also O'Neal*, 513 U.S. at 443 ("[T]he State normally bears responsibility for the error that infected the initial trial."). Only if the State has persuaded us that there was no substantial and injurious effect on the verdict do we find the error harmless.

This framework is faithful to the balance the Supreme Court has struck between concerns of federal-state comity and finality in state criminal trials, and the irreversible harm caused by an execution resulting from an unconstitutional error. In weighing these concerns in a non-capital case, the Supreme Court stated:

> [T]he number of acquittals wrongly caused by grant of the writ and delayed retrial (the most serious harm affecting the State's legitimate interests) will be small when compared with the number of persons whom this opposite rule (denying the writ) would wrongly imprison or execute. On balance, we must doubt that the law of habeas corpus would hold many people in prison "in violation of the Constitution," for fear that otherwise a smaller number, not so held, may eventually go free.

O'Neal, 513 U.S. at 443. Placing the "risk of doubt" on the state is also consistent with the body of jurisprudence that has placed the burden of showing lack of prejudice on the party who would benefit from the constitutional error. *Id.* at 437-44; *United States v. Olano*, 507 U.S. 725, 741 (1993) (stating that the government bears the "burden of showing the absence of prejudice"); *Chapman v. California*, 386 U.S. 18, 24 (1967) (noting that "the original common-law harmless-error rule put the burden on the beneficiary of the error . . . to prove that there was no injury"). *Kotteakos*, which articulated the harmlessness standard that *Brecht* later adopted and that we now apply, "places the burden on prosecutors to explain why those errors were harmless." *Brecht*, 507 U.S. at 640 (Stevens, J., concurring).[18]

[9] Considering the record before us, the State has not provided us with a "fair assurance" that the error did not prejudice the penalty phase of Payton's trial. *O'Neal*, 513 U.S. at 437-38; *Valerio*, 306 F.3d at 762. On one side of the balance sheet is the State's evidence of aggravating circumstances. There is no question that this was a brutal crime. The prosecution introduced eyewitnesses to Payton's actions, testimony as to his motives and character, and forensic and other evidence to demonstrate to the jury the devastating effects of the crime.

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[18]To the extent that they are inconsistent with this opinion, we overrule the statements in *Rodriguez*, 125 F.3d at 744; *Franklin*, 122 F.3d at 1273; and *Thomas v. Hubbard*, 273 F.3d 1164, 1170 (9th Cir. 2002) (as amended) that appear to place the burden on the petitioner to establish that there was harm under *Brecht*, and the statements in *Fisher*, 263 F.3d at 917, and *Keating*, 191 F.3d at 1062, that appear to place the same burden on the State.

It is the other side of the balance sheet that undermines any assurance that the jury's verdict was not affected. As required by California Penal Code § 190.3, the trial court further instructed the jury that "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death." We have determined that there is a reasonable likelihood that the jury accepted the prosecutor's erroneous statement of the law rather than the defense counsel's and that it therefore failed to consider the only evidence offered in mitigation of the death penalty. That left the jury bereft of any countervailing evidence to weigh against the prosecution's evidence of aggravating circumstances.

[10] We cannot know whether the jury would have returned a verdict of life or of death had it been properly instructed. Payton's extensive evidence of his conversion to Christianity, positive influence on other inmates, and other good works in jail were offered to evoke to the jury his potential for rehabilitation.[19] If the jury had been inclined to weigh favorably evidence of redeeming features of his character or his conduct while in custody pending trial, it would have felt constrained by law from considering that evidence. Without Payton's mitigating evidence, the jury was bound by California Penal Code § 190.3 to impose a death sentence. *See Easley*, 671 P.2d at 827.

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[19]We note that the mitigating evidence strongly suggested that Payton's religious conversion was more than merely a "miracle on the cellblock." Ultimately, however, resolving the question of the depth of Payton's beliefs demands the kind of sifting and weighing of the evidence that is the jury's exclusive realm. *See Skipper*, 476 U.S. at 9 (remanding for new penalty phase trial when exclusion of post-crime mitigating evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender").

[11] Having pondered "all that happened without stripping the erroneous action from the whole," *O'Neal*, 513 U.S. at 437 (quoting *Kotteakos*, 328 U.S. at 764-65), we do not arrive at a fair assurance that the error was harmless. As we have previously stated, "[b]ecause a death sentence is qualitatively different from other forms of punishment, there is a greater need for reliability in determining whether it is appropriate in a particular case." *Coleman v. Calderon*, 210 F.3d 1047, 1050 (9th Cir. 2000); *see also Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."). Far from a fair assurance that the error was harmless, the "possible jury confusion" arising from the trial court instruction leaves us in "grave doubt about the likely effect of [the] error on the jury's verdict." *O'Neal*, 513 U.S. at 435; *see also Fisher*, 263 F.3d at 917-18. We therefore conclude that the instructional error had a "substantial and injurious effect or influence on the jury's verdict" that necessitates a new penalty phase trial. Payton is entitled to a penalty trial before a jury that is properly instructed that it must take his post-crime evidence into account in determining whether to impose a sentence of life or death.

CONCLUSION

Accordingly, we AFFIRM the judgment of the district court granting Respondent's motion for summary judgment as to all claims except Claim IVB, item 3 of the petition for habeas corpus, and granting the writ of habeas corpus as to the penalty phase of the trial.

AFFIRMED.

TALLMAN, Circuit Judge, dissenting in part, joined by Circuit Judges Kozinski, Trott, Fernandez, and T.G. Nelson:

Today, six judges of this court announce that the legal conclusion reached by *seven* of their colleagues[1] (*plus* five justices of the California Supreme Court) is not only wrong, but *objectively unreasonable* in light of clearly established federal law. According to the six judges in the majority, those twelve judges were so off-the-mark in their analyses of United States Supreme Court precedent that their shared legal conclusion—that Payton's constitutional rights were not violated by the "unadorned" factor (k) instruction—must be deemed objectively unreasonable. I respectfully dissent.[2]

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[1]*See* 299 F.3d 815, 830 (9th Cir. 2002) (en banc) (Tallman, J., dissenting in part, joined by Judges Kozinski, Trott, Fernandez, and T.G. Nelson); 258 F.3d 905, 910 (9th Cir. 2001) (Rymer, J., joined by Gould, J.)

[2]I concur in the court's decision not to disturb the underlying conviction and to reject most of Payton's challenges to both his conviction and sentence. Maj. Op. at 15174 n.1. No one supports Payton's argument that he received ineffective assistance of counsel at either the guilt or penalty stages of trial. Even though defense counsel did not present any witnesses, not a single member of this en banc panel believes that Payton was prejudiced during the guilt phase in light of the overwhelming evidence against him. Nor does a single judge believe "there is a reasonable probability that, absent [any errors of defense counsel], the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

I

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218, (AEDPA) significantly limited the power of the federal bench to grant a state prisoner's petition for habeas corpus. Post-AEDPA, the successful habeas applicant must convince the federal judge or appellate panel that the state court decision upholding his conviction or sentence is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The majority holds that the California Supreme Court unreasonably applied Supreme Court precedent in upholding Payton's sentence of death. Maj. Op. at 15190. In order for the majority to reach this conclusion, it must have decided that the California Supreme Court's holding was "more than incorrect or erroneous," for the "unreasonable application" clause of § 2254(d)(1) means "objectively unreasonable." *Lockyer v. Andrade*, 123 S. Ct. 1166, 1174 (2003). "It is not enough that a federal habeas court, in its independent review of the legal question is left with a firm conviction that the state court was erroneous." *Id.* at 1175 (citation and quotation marks omitted); *see also Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) ("Under § 2254(d)'s 'unreasonable application' clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [United States Supreme Court precedent] incorrectly.")

Did the California Supreme Court *unreasonably* apply United States Supreme Court precedent? Certainly not.

The California Supreme Court explicitly acknowledged the Eighth Amendment requirement that a sentencing jury in a

capital case consider mitigating character and background evidence. *People v. Payton*, 839 P.2d 1035, 1047-48 (Cal. 1992). Then, applying the United States Supreme Court's decision in *Boyde v. California*, 494 U.S. 370 (1990), the California Supreme Court concluded that it was not "reasonably likely that the jurors believed the law required them to disregard [Payton's] mitigating evidence." *Id.* at 1048. In other words, the California Supreme Court determined that Payton's jury heard and considered Payton's mitigating evidence before deciding that death was warranted.

The California Supreme Court's application of the *Boyd* decision was not only reasonable but correct. In *Boyde*, the United States Supreme Court upheld against an Eighth Amendment challenge the same CALJIC jury instruction employed in Payton's penalty trial. The central issue in *Boyde*, as in Payton's case, was whether factor (k)'s language limits the jury to consideration of evidence only directly related to the crime. The United States Supreme Court emphatically rejected such a reading. *See Boyde*, 494 U.S. at 382 ("The instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstance *of the crime* which extenuates the gravity of the crime.' The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character.") (emphases in original); *see also id.* at 383 (finding it "improbable that jurors would arrive at an interpretation that [factor (k)] precludes consideration of all non-crime-related evidence").

Though perhaps it could have, the California Supreme Court did not cite to *Boyde* and end its analysis. Recognizing that "*Boyde* does not prevent a defendant from asserting a claim to the effect that prosecutorial argument, or other factors, led the jury to misinterpret factor (k)," *Payton*, 839 P.2d at 1048, the

court took pains to explain that no misinterpretation occurred here.

First of all, the court stated that the impact of the prosecutor's erroneous argument (that post-crime mitigating evidence should not be considered by the jury) was "blunted" by defense counsel's objection and the trial court's admonition to the jury that counsels' arguments were not evidence.[3] *Payton*,

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[3]In closing argument the prosecutor incorrectly stated that factor (k) "doesn't refer to anything after the fact or later," whereupon the trial court immediately admonished the jury that comments made by counsel were argument, not evidence. I do not understand why we should not accord this standard admonishment the respect we normally afford it in noncapital cases. Jurors are presumed to follow such admonitions absent specific proof that they did not. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

The prosecutor's arguments were also of concern in *Boyde*, and the Supreme Court stated:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the court. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the

839 P.2d at 1048. Second, the court noted that the prosecutor's own statements lessened the impact of the erroneous argument. "[T]he prosecutor implicitly conceded the relevance of [Payton's] mitigating evidence by devoting substantial attention to it."[4] *Id.* at 1049. Third, and perhaps most significant, the court explained that the jury was unlikely to ignore Payton's mitigating evidence—regardless of the ambiguous factor (k) instruction or the prosecutor's arguments—since doing so would have turned the penalty phase "into a virtual charade." The court stated:

> For the jury to have accepted a narrow view of factor (k) in this case would have meant disregarding all of defendant's mitigating evidence, since the testimony

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> arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

Boyde, 494 U.S. at 384-85 (citations omitted).

[4]The prosecutor certainly erred by arguing that the jury had not heard "any legal evidence in mitigation." But for the majority of his closing, the prosecutor did what he should have done and argued not that jurors could not consider Payton's religious conversion but that they should not *value* it much. The prosecutor argued that the religious conversion would not seem to "lessen the gravity of the offense"; that the defense evidence was offered "to win [the jury's] sympathy"; that Payton's new-found religion could not undo his bad acts from the past; and that while Payton appealed to the jurors' mercy, he had shown none to his victims. The prosecutor also implicitly acknowledged that the evidence presented by the defense counted for *something* when he stated "[i]f you want to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery."

> of his eight penalty phase witnesses was all directed to his religious conversion and consequent behavior in prison. Indeed, it would have meant disregarding virtually the entire penalty phase, since the testimony of the prosecution's two witnesses occupies only eleven pages of the transcript. We think it unlikely, however, as did the high court in *Boyde*, "that reasonable jurors would believe the court's instructions transformed all of [Payton's] 'favorable testimony into a virtual charade.' "

Id. (quoting *Boyde*, 494 U.S. at 383). Moreover, the court noted that the trial court "instructed the jury to consider '*all* of the evidence which has been received during any part of the trial' in determining the penalty." *Id.* (quoting *Boyde*, 494 U.S. at 383) (emphasis added). The trial court's admonition to consider *all* the evidence buoyed the conclusion that the jury considered Payton's mitigating evidence. Finally, the court noted that Payton's attorney, "in his own closing argument, strongly reinforced the correct view that [Payton's] religious conversion was proper mitigating evidence." *Id.* Defense counsel argued: "[S]ection (k) may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phrase. It was designed to include, not exclude, that kind of evidence." *Id.*

After this thorough analysis, the California Supreme Court concluded that "it is not reasonably likely that the jury understood the court's instructions as precluding consideration of defendant's mitigating evidence." *Id.*

How that decision constitutes an unreasonable application of United States Supreme Court precedent is a mystery to me. The California Supreme Court identified the correct governing rule—that mitigating background and character evidence may not be precluded from the sentencing jury's consideration—and

then decided that the rule was not violated. To reach this decision the California court faithfully followed the dictates of *Boyde*, the most analogous Supreme Court case.

Apparently *Boyde* was the wrong case to apply, for the majority tells us that "*Boyde* does not control this case . . . ." Maj. Op. at 15182. According to the majority, the California Supreme Court was unreasonable because it "did not give proper effect to clearly established Supreme Court cases such as *Skipper [v. South Carolina*, 476 U.S. 1 (1986),] and *Penry [v. Lynaugh*, 492 U.S. 302 (1989),] that are controlling here." *Id.*

Neither *Skipper* nor *Penry* supports the proposition that the California Supreme Court erred, let alone unreasonably applied clearly established federal law. Both cases are plainly distinguishable from the case at bar. In *Skipper*, the trial court *excluded* as irrelevant defense witnesses who would have testified that the defendant had "made a good adjustment" while in prison. 476 U.S. 1, 3 (1986). Payton, in contrast, was not precluded from calling such character witnesses. In fact, Payton called eight witnesses who all testified that Payton had discovered God while in jail.

Penry, at least, has somewhat similar facts to this case. There the defendant produced mitigating evidence of his mental retardation and abused childhood but was still sentenced to death. Like Payton, Penry argued that his constitutional rights were violated by inadequate jury instructions, which effectively precluded the jury from considering his mitigating evidence. The instructions posed three questions for the jury to consider: (1) "Did Penry act deliberately when he murdered [the victim]?" (2) "Is there a probability that he will be dangerous in the future?" (3) "Did he act unreasonably in response to provocation?" 492 U.S. at 320. If the jury answered all three questions in the affirmative, state law required the trial court to impose a sentence of death. *Id.* at 310.

According to the Supreme Court, none of these instructions provided the jury "with a vehicle for expressing its 'reasoned moral response' to [Penry's mitigating] evidence in rendering its sentencing decision." *Id.* at 328. None of the questions allowed the jury to take into account Penry's mental retardation or past child abuse. The first instruction asked the jurors to decide whether Penry acted "deliberately." *Id.* at 322. However, as the Court noted:

> Personal culpability is not solely a function of a defendant's capacity to act "deliberately." A rational juror . . . could have concluded . . . that [Penry] deliberately killed [the victim] to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was less "morally culpable than defendants who have no such excuse," but who acted "deliberately" as that term is commonly understood.

Id. at 322-23 (internal quotation marks and citation omitted).

The second question, asking whether Penry would be dangerous in the future, also precluded the jury from considering Penry's mitigating evidence. In fact, Penry's mental retardation and childhood abuse suggested that he would pose a continuing threat to society. *Id.* at 324 ("Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."). The final question asked whether Penry's response to the provocation of the victim was unreasonable. The Court held that this instruction similarly did not allow the jury to consider Penry's mitigating evidence because "Penry's

mental retardation and arrested emotional development . . . would not necessarily diminish the 'unreasonableness' of his conduct . . . ." *Id.*

Unlike the instructions in *Penry*, which on their face precluded the jury from considering the defendant's mitigating evidence, the instructions here allowed Payton's jury to consider "*any other circumstance* which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code § 190.3(k) (1978) (emphasis added). In *Boyde*—the case the majority desperately wants to ignore—the United States Supreme Court held that "there is not a reasonable likelihood that Boyde's jurors interpreted the [unadorned factor (k) instruction] to prevent consideration of mitigating evidence of background and character." 494 U.S. at 381. Post-*Boyde*, one cannot argue that the unadorned factor (k) instruction is constitutionally deficient on its face as were the instructions given in *Penry*. *Penry* does not control this case. And it certainly does not suggest that the California Supreme Court unreasonably applied United States Supreme Court precedent when it extended *Boyde* to post-crime mitigation evidence.[5]

Why does the majority rely on cases such as *Penry* and *Skipper* while discounting *Boyde*, a case almost directly on

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[5]Other cases cited by the majority, such as *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978), are also distin guishable. In *Eddings*, the trial court heard mitigating evidence of the defendant's violent upbringing and emotional disturbance but improperly decided that such evidence could not be considered as a matter of law. 455 U.S. at 109. In *Lockett*, the Court held that the Ohio death penalty statute was unconstitutional because of "[t]he limited range of mitigating circumstances [provided in the statute] which may be considered by the sentencer . . . ." 438 U.S. at 608.

point?[6] The reason must be that *Boyde* suggests a different result than the one the majority wants to reach. True, *Boyde* concerned "pre-crime" mitigation evidence whereas this case concerns "post-crime" mitigation evidence. But once one acknowledges, as the Supreme Court did in *Boyde*, that factor (k)'s text allows for consideration of evidence beyond the crime itself, there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths.

Moreover, as both the *Boyde* Court and the majority's opinion here recognize, factor (k) allows jurors to consider a defendant's character. And that is basically what Payton's attorney tried to show during the penalty phase—that Payton had undergone a character transformation after being jailed. Witnesses for Payton stated that he turned away from his former evil ways and toward God; he no longer sought to harm and abuse, stab and rape women; instead, he sought to help his fellow male inmates. Payton presented a significant amount of evidence to that effect, and the jury listened to it. We must presume the jury considered it. As the *Boyde* Court noted:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all

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[6]Though when *Boyde* is helpful to the majority's argument, it is cited and applied. *See* Maj. Op. at 15186-87 (explaining that the California Supreme Court's conclusion regarding the impact of the prosecutor's argument that factor (k) precluded post-crime mitigation evidence "was an unreasonable application of *Boyde*").

> that has taken place at the trial likely to prevail over technical hairsplitting.

494 U.S. at 380-81. Unfortunately for Payton, the jury either did not believe this miracle on the cellblock or did not value it much in comparison to the horrific crimes he committed.

Perhaps I am wrong and the majority is correct that *Boyde* is distinguishable from this case because it concerned precrime mitigation evidence. But even so, I am at a loss to understand how the California Supreme Court unreasonably applied any United States Supreme Court precedent. The pre-crime/post-crime mitigating evidence dichotomy offered by the majority is the majority's own untenable invention—not that of the United States Supreme Court. AEDPA commands that we show more respect for our counterparts in the California judiciary. We do not have the right to ignore AEDPA, however much our personal sense of justice urges us to overturn Payton's sentence. We are not Congress. We are not the United States Supreme Court.

Reasonable minds might disagree as to whether Payton's sentence was based on constitutionally adequate jury instructions, especially considering the prosecutor's erroneous arguments to the jury. But that is not the question before us. For us to grant Payton's petition, the California Supreme Court's decision must have been *objectively unreasonable*, which means "more than incorrect or erroneous." *Andrade*, 123 S. Ct. at 1174. Under this standard it was not. *Boyde*—as well as *Penry* and *Skipper*—gave the California Supreme Court plenty of latitude to reach the decision that it reasonably made. The California Supreme Court is just as qualified as we are to distinguish and apply United States Supreme Court precedent. The majority's "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Visciotti*, 537 U.S. at 24.

II

We turn to the question of harmless error, which the majority hastily jettisons. The prosecutor may have been wrong in urging the jury to disregard the defendant's post-arrest claim of religious conversion, but we must not forget the factual context in which the jury rendered its decision. In the wee hours of the morning of May 26, 1980, William Charles Payton arrived at the Garden Grove, California, home of Patricia Pensinger. Payton, who had once been a boarder in Pensinger's home, found Pensinger awake and working on a crossword puzzle in the kitchen. He informed her that he was experiencing car trouble. Pensinger graciously welcomed Payton into her home and offered him some beer, which he drank while talking with Pensinger until about 4:50 a.m. During their conversation, Pamela Montgomery, a boarder temporarily residing at Pensinger's home, entered the kitchen. Pensinger introduced her to Payton. Montgomery, who was staying with Pensinger while her husband was on duty with the National Guard, filled a glass with water, then left the kitchen and returned to her bedroom. Payton asked Pensinger if he could sleep on the living room couch and Pensinger said he could.

While everyone else in the house was fast asleep, Payton repaid Pensinger for her hospitality by waking her with two blows to her back, stabbing her forty times on her face, neck, back and chest, and stabbing her ten-year-old son, Blaine, twenty-three times in the face, neck and back. Miraculously, both Pensinger and her son survived. Pamela Montgomery was not so lucky. Her body was found after Payton fled the Pensinger residence. He returned to his own home where his wife saw him covered in blood. Forensic evidence suggested either that Payton stabbed Montgomery twelve times during sexual intercourse, or that he raped her while she lay comatose and bleeding to death from her wounds.

William Charles Payton did not suffer from a mental illness; he was not "made bad" by his upbringing; he was not a generally good person who did one heinous act out of character; and he was ably defended by competent counsel. On this record, the jury could easily find that William Charles Payton was a vile human being who chose a despicable path in life that culminated in a series of heinous crimes on the morning of May 26, 1980.

Had Payton changed by the time of his trial and sentencing? Who knows? We do know that the jury heard evidence of his post-crime religious conversion. The conversion may have counted for something, but it was up to a jury two decades ago to decide how to value his fortuitous epiphany. Certainly, there might have been substantial doubt concerning Payton's sincerity given the timing of his religious conversion, but even if his commitment were sincere, the jury may very well have concluded that such matters concerned Payton's soul, not his life.

Our job today is to ask: "Do [we, as judges], think that the error substantially influenced the jury's decision?" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Common sense tells us the answer is no. Abstract legal discussions are important in the development of the law, but so is the ability to look at the impact of those abstract decisions in the context of the real world. Any legal errors in this case were harmless in relation to the acts committed by the man who stood before the jury and asked it to mitigate his sentence based solely on his change of heart after he was caught.

III

Twelve jurors listened to Payton's evidence in mitigation and determined it was not sufficient to avoid a sentence of death. Twelve judges carefully examined the penalty phase

instructions and found them to be constitutionally adequate. Six judges disagree. Objectively, who is being unreasonable?

APPENDIX B

APPENDIX B

[Filed April 21, 2003]

**Jeanne WOODFORD, Warden,
petitioner, v. William
Charles PAYTON.
No. 02-1055.**

April 21, 2003.

Case below, 299 F.3d 815.

On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Motion of respondent for leave to proceed *in forma* pauperis granted. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Woodford v. Garceau*, 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003).

APPENDIX C

APPENDIX C

[Filed August 1, 2002]

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM CHARLES PAYTON, *Petitioner-Appellee,* v. JEANNE WOODFORD, Warden, *Respondent-Appellant.*	No. 00-99000 D.C. No. CV-94-04779-R

WILLIAM CHARLES PAYTON, *Petitioner-Appellee,* v. JEANNE WOODFORD, Warden, *Respondent-Appellant.*	No. 00-99003 D.C. No. CV-94-04779-R OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted En Banc
March 20, 2002----Phoenix, Arizona

Filed August 1, 2002

Before: Mary M. Schroeder, Chief Judge, Harry Pregerson, Alex Kozinski, Stephen S. Trott, Ferdinand F. Fernandez, Thomas G. Nelson, A. Wallace Tashima, William A. Fletcher, Richard A. Paez, Marsha S. Berzon and Richard C. Tallman, Circuit Judges.

Opinion by Judge Paez; Partial Concurrence and Partial Dissent by Judge Tallman

COUNSEL

Nancy Palmieri, Deputy Attorney General, Esteban Hernandez, Deputy Attorney General of the State of California, Los Angeles, California, for the respondent-appellant-cross-appellee.

Dean R. Gits, Overland & Gits, Santa Monica, California, for the petitioner-appellee-cross-appellant.

OPINION

PAEZ, Circuit Judge:

A California jury convicted Petitioner-Appellee William Charles Payton of the first degree murder and rape of Pamela Montgomery, and the attempted murder of Patricia Pensinger and her son, Blaine Pensinger. The jury imposed the death penalty. Payton appealed both the underlying conviction and the death sentence.

At the penalty phase of a trial in which a death sentence is at stake, a state may not preclude the jury from considering any mitigating circumstance "that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (internal quotations and citations omitted). The

California death penalty statute channels the jury's assessment of the appropriate penalty into an eleven-factor test that structures the jury's weighing and balancing of the aggravating and mitigating circumstances. The first ten factors instruct the trier of fact to evaluate various circumstances specific to the crime and to account for the defendant's age and prior convictions. The eleventh factor — factor (k) — functions as a catch-all, enabling the jury to consider any other circumstance that the defendant presents in mitigation of a death sentence.

We are confronted here with the issue of whether, in Payton's trial, the jury instructions regarding factor (k) impermissibly limited its constitutionally-mandated role as a vehicle for permitting the jury to consider all the mitigating evidence presented regarding whether Payton deserved a life term rather than a death sentence. In instructing the jury, the trial court employed the then-existing model jury instructions which incorporated the multi-factor test in the statute. 1 California Jury Instructions, Criminal ("CALJIC") 8.84.1 (4th ed. 1979). That instruction simply quotes factor (k), directing the jury to consider any circumstance "which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Id.*; Cal. Penal Code § 190.3 (1978). The Supreme Court, reviewing the same jury instruction in *Boyde v. California*, 494 U.S. 370 (1990), held that the text of factor (k), as clarified by the trial court, enabled the jury to consider precrime character and background evidence. The Court did not address the question of factor (k)'s application to post-crime evidence of rehabilitation, and did not have occasion to evaluate the effect on the jury of a prosecutor's contention that such evidence could not be considered. Those questions squarely confront us here.

At the penalty phase of Payton's trial, the only evidence offered in mitigation was Payton's post-crime conversion to Christianity and his good works while in jail, which were

offered under factor (k). The defense offered no other evidence then or at any other time during his trial. In closing argument, the prosecutor erroneously told the jury that factor (k) did not encompass the only evidence Payton offered to mitigate a sentence of death. Although defense counsel objected to the prosecutor's argument, the trial court failed to cure the error.

On automatic appeal to the California Supreme Court, Payton argued, among other things, that he was deprived of a fundamentally fair trial because the trial court's instructions and the prosecutor's erroneous argument led the jurors to believe that they were not permitted to consider Payton's mitigating evidence. The California Supreme Court affirmed the conviction and sentence. *People v. Payton*, 839 P.2d 1035 (Cal. 1992), *cert. denied*, 510 U.S. 1040 (1994). Subsequently, the California Supreme Court denied Payton's petition for a writ of habeas corpus. Payton then filed a petition for habeas corpus relief in federal court under 28 U.S.C. § 2254 (1994). The district court concluded that the penalty phase of the trial was fundamentally unfair and granted a writ of habeas corpus requiring either a new penalty trial or the reduction of Payton's sentence to a life term without parole. A divided three judge panel of our court reversed the grant of the writ as to the penalty phase. *Payton v. Woodford*, 258 F.3d 905 (9th Cir.), *reh'g en banc granted*, 273 F.3d 1271 (2001).

We then agreed to rehear this case en banc. We affirm the district court's judgment in full. We hold that it is reasonably likely that the text of factor (k) and the trial court's failure to correct the prosecutor's misstatements about the reach of factor (k) caused the jury to disregard relevant mitigating evidence, and that this error was not harmless.[1]

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[1]Payton also contested the underlying conviction, raising several challenges to the guilt phase of his trial. The district court found no constitutional error in his conviction. In appeal

Background[2]

In 1980, while spending the night at Patricia Pensinger's home, Payton raped Pamela Montgomery and stabbed her to death. Payton then entered the bedroom of Pensinger and her son Blaine, stabbed each of them repeatedly, and fled. Payton was charged with the first degree murder and rape of Montgomery, and the attempted murders of Pensinger and her son.

At the guilt phase of Payton's jury trial, the prosecution presented testimony from the law enforcement officers who observed the crime scene; forensics experts who confirmed that saliva and semen samples taken from Montgomery's body were consistent with Payton's; Patricia and Blaine Pensinger who gave victims' accounts of the attacks; Payton's wife, who stated that soon after the attacks she saw blood on Payton's clothes, face, hands and penis as well as fingernail scratches and digs on his legs and back; and a fellow inmate, Alejandro Garcia, who recounted that Payton admitted that he raped and stabbed Montgomery and stabbed the Pensingers because he "had this urge to kill." The defense called no witnesses, and the jury convicted on all counts.

No. 00-99003, Payton challenges the district court's rulings rejecting his claims of ineffective assistance of counsel, prosecutorial misconduct during the guilt phase of the trial, and the cumulative effects of the alleged constitutional errors. The panel affirmed the district court's rulings on these issues, as do we. We adopt the panel's reasoning on the guilt phase issues as our own. *See Payton*, 258 F.3d at 919-25.

[2]We summarize the pertinent facts only briefly. The facts surrounding Payton's conviction are set forth in detail in the opinions of the panel and the California Supreme Court. *Payton*, 258 F.3d at 910-14; *Payton*, 839 P.2d at 1039-40.

During the penalty phase, the prosecution presented as a witness a fellow inmate who testified to his jailhouse conversations with Payton in which Payton admitted that he had "severe problems with sex and women," that he wanted to "stab them and rape them," and that every "wom[a]n on the street he [saw] was a potential victim, regardless of age or looks." Payton's tormer girlfriend related that she had once awakened to find Payton holding a kitchen knife to her neck, and that he had stabbed her chest and arms. After she pushed him off, he stayed with her and held a towel around her bleeding arm until the police arrived.

The defense presented eight witnesses, including Payton's pastor, a deputy sheriff, four inmates, his mother, and the director of a religious organization ministering to prisoners. Their testimony, taken as a whole, tended to show that Payton had been "born again," made a sincere commitment to God, and was performing good works in jail.

Payton's pastor testified that in his opinion, Payton's conversion was credible and that he was "sincere in his statement and commitment to the Lord." The director of a religious outreach organization ministering to prisoners testified to her numerous conversations with Payton about his spiritual commitment and its manifestation in the bible study groups he established with other inmates. She described his conversion of other inmates, his admission to a correspondence bible college, and his writings.

Four inmates testified that they believed that Payton's religious eonversion was sincere and that he had a calming influence on other inmates. One testified that Payton's intervention prevented him from committing suicide. A deputy sheriff assigned to Payton's jail facility related that Payton led prayer meetings and had a positive influence on other inmates. Payton's mother described praying together with her son and

discussing religion on a weekly basis. Asked if she had noticed a change in her son, she responded: "Oh, yes . . . . He's totally immersed in the Lord . . . . He's an instrument of the Lord as far as he's concerned."

Prior to closing arguments in the penalty phase, the judge held an in-chambers conference with the attorneys about the jury instructions. They discussed the application of the multifactor CALJIC instruction that guides the jury in determining whether to impose a sentence of life imprisonment or death.[3]

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[3]The instruction provided in full:

> In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [*sic*] of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though

Factor (k), the eleventh and final factor, directed that the jury consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CALJIC 8.84.1. Payton's counsel sought an amendment to the instruction that expressly would have directed the jury to consider "evidence of the defendant's character, background, history, mental condition and physical condition."[4] Although the trial judge agreed with the defense counsel's interpretation of factor (k), he declined the request because he was reluctant to alter the instruction insofar as it reflected verbatim the text of California Penal Code § 190.3. He stated that he would allow counsel to argue the point. The judge also denied defense counsel's separate proposal to amend the instruction to permit the jury to consider Payton's "potential for rehabilitation."

During closing argument, the prosecutor argued to the jury that factor (k) applied to "some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did" but that it did not "refer to anything after the fact or later." He asserted that factor (k) did not encompass Payton's conversion to Christianity and good conduct in jail because they occurred "well after the act of the crime," and the factor "seems

it is not a legal excuse for the crime.

CALJIC 8.84.1. In his instructions to the jury, the trial judge omitted the bracketed word "each" and retained the bracketed phrase "except as you may be hereafter instructed."

[4]The proposed amendment read: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, including evidence of the defendant's character, background, history, mental condition and physical condition."

to refer to a fact in operation at the time of the offense." At one point, the prosecutor said:

> What I am getting at, you have not heard during the past few days any legal evidence of mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial.

Concluding, the prosecutor told the jury that he did not "want to spend too much time on [Payton's religious conversion] because I don't think it's really applicable and I don't think it comes under any of the eleven factors."

In response to the prosecutor's factor (k) argument, the defense moved for a mistrial, objecting that the prosecutor's argument was "completely contrary to what we all agreed in chambers on the record 'k' was designed to apply to." The court responded that it was a "fair comment on either side" and "I think you can argue it either way." The court told the jury that "the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective."

Defense counsel's closing argument acknowledged that factor (k) "may be awkwardly worded." He argued that the factor was designed as a catch-all to include the kind of evidence in mitigation he had presented, and that, for Payton, it was the most critical of the factors.

After the closing arguments, the judge instructed the jury as noted above. Upon receiving instructions that it must reach a unanimous result, the jury retired to deliberate. The jury returned a verdict of death.

Discussion

We hold that the district court properly granted the writ of habeas corpus. As a preliminary matter, we confirm that this case is governed by the legal standards in effect prior to the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218 (April 24, 1996) ("AEDPA"). We then conclude that the relevant inquiry in this case is whether there was instructional error under *Boyde*, 494 U.S. at 380. We hold that, under *Boyde*, there is a "reasonable likelihood" that the jury applied factor (k) in a way that prevented the consideration of constitutionally relevant evidence. *Id.* We further hold that this error was not harmless because of the likelihood that it precluded consideration of the only mitigating evidence that Payton presented at trial.

A. Application of AEDPA

Because Payton filed his petition for the appointment of habeas counsel prior to the effective date of AEDPA, we review the district court's order under pre-AEDPA standards. *See Calderon v. United States Dist. Court ("Kelly")*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc) (holding that a petition for appointment of habeas counsel, coupled with a motion for a stay of execution, fixes the date for determining whether AEDPA applies). We decline Respondent's invitation to reconsider our decision in *Kelly*.

Applying pre-AEDPA standards, we presume that state court determinations of historical fact are correct. 28 U.S.C. § 2254(d) (1994). In contrast, the application of legal standards to historical facts does not warrant a presumption of correctness under § 2254(d) (1994). *Thompson v. Borg*, 74 F.3d 1571, 1573 (9th Cir. 1996).

B. Instructional Error

[1] The central question in this case is whether the jury received a constitutionally adequate instruction guiding consideration of Payton's mitigating evidence. The Constitution requires a capital jury to consider all relevant mitigating evidence. *Boyde*, 494 U.S. at 377-78; *Eddings*, 455 U.S. at 113-14 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."). This broad permission includes authority to consider evidence of Payton's good conduct after the crime. *Skipper v. South Carolina*, 476 U.S. 1 (1986) (holding that post-crime good behavior must be considered as mitigating evidence). The trial court's instructions to the jury must impart this constitutional directive.

Respondent urges us to apply the standard for prosecutorial misconduct rather than instructional error and consider whether the prosecutor's argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Applying this standard, the district court concluded that Payton's trial had been unconstitutionally infected with unfairness.

We need not go down that road. At bottom, the constitutional violation here flows from the lack of guidance that the jury received regarding its duty to consider mitigating evidence. The prosecutor's arguments cannot be isolated from the instruction itself or from the failure of the trial judge properly to instruct the jury or to correct the prosecutor's error. Thus, the focus of our inquiry is whether, viewing the case as a whole, the court's instructions properly guided the jury to consider Payton's mitigating evidence.

Our approach here is consistent with *Boyde*. In *Boyde*, the Court first determined whether there was a reasonable likelihood that the jury applied the factor (k) instruction in a way that prevented consideration of the mitigating background and character evidence that Boyde presented. 494 U.S. at 381-84. It then turned to Boyde's claim that the prosecutor's argument reinforced an impermissible interpretation of factor (k). *Id.* at 384-86. Significantly, the Court did not discuss the prosecutorial misconduct standard. Instead, as we do here, the Court analyzed how the jury would have interpreted the instruction in light of the prosecutor's argument. *Id.*

[2] Under *Boyde*, we must reverse for instructional error if the challenged instruction is potentially ambiguous and there is a "reasonable likelihood" that the jury applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. *Id.* at 380. We must also determine whether the error was harmless. *Id.* at 380; *Calderon v. Coleman*, 525 U.S. 141, 147 (1998) (per curiam).

1. Ambiguity in unadorned factor (k)

[3] The meaning of the factor (k) model instruction as it existed at the time of Payton's trial was far from clear.[5] That instruction directed the jury to consider "any other circumstance

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[5]In line with the suggestion of the California Supreme Court in *People v. Easley*, 671 P.2d 813 (Cal. 1983), the factor (k) instruction has since been amended to ensure that the jury may consider "any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." *See* CALJIC 8.85(k) (6th ed. 1996); *see Easley*, 671 P.2d at 826 n.10. We refer to the factor (k) instruction as it existed prior to this amendment as "unadorned."

which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code § 190.3. We "approach jury instructions in the same way a jury would — with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.' " *Penry v. Johnson,* 532 U.S. 782, 800 (2001) (quoting *Boyde*, 494 U.S. at 381). Most naturally read, the phrase "extenuates the gravity of the crime" refers to evidence relating to or ameliorating the crime itself. On its face, factor (k) does not encompass the kind of post-crime evidence of good works, leadership and religious beliefs that Payton presented at the penalty phase of his trial.[6] Certainly, the prosecutor's interpretation of this factor as excluding post-crime evidence bolsters the conclusion that the jury instruction was ambiguous in its application to Payton's mitigating circumstances.

The year after the jury announced Payton's death sentence, the California Supreme Court recognized the potential for jury confusion inherent in the wording of factor (k). *People v. Easley*, 671 P.2d 813, 825-26 & n.10 (Cal. 1983). The court acknowledged that there was some force to the argument that a jury might reasonably construe the text of the instruction "to permit consideration only of circumstances that relate to the 'gravity *of the crime*' and not of circumstances that relate to the general character, family background or other aspects *of the defendant.*" *Id.* at 825-26.

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[6]The dissent casts Payton's religious beliefs as an overnight occurrence manufactured for the occasion, stating that the jury heard evidence of Payton's religious conversion "after Payton was apprehended for raping and murdering one individual and attempting to murder two others." *Infra*, at 10782. In fact, a year and nine months spanned the date of the crime and the date of Payton's death sentence, during which Payton's conversion and religious works took place.

The United States Supreme Court held that the factor (k) instruction was not ambiguous as applied to pre-crime background and character evidence as long as the trial court provided clarification of its meaning.[7] *Boyde*, 494 U.S. at 381-82 n.5. The Court held that factor (k) passed constitutional muster because there was no "reasonable likelihood" that the jury was misled into believing it could not consider Boyde's mitigating evidence. *Id.* at 381.

Boyde did not address the question whether, on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to post-crime evidence. The fact that all of Payton's mitigating evidence was post-crime distinguishes this case from the pre-crime evidence at issue in *Boyde* which "more readily fits within factor (k)."[8] *Payton*, 258 F.3d at 928 (Hawkins, J., dissenting). Significantly, *Boyde* distinguished the pre-crime evidence at issue there from evidence — such as Payton's — that "pertain[ed] to prison behavior after the crime for which he was sentenced to death." *Boyde* at 382 n.5.

[4] Unlike the pre-crime evidence in *Boyde*, post-crime mitigation evidence is simply not covered by any natural reading of the words of the unadorned factor (k) instruction.

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[7]The trial court in *Boyde* defined the term "extenuate" to mean "to lessen the seriousness of the crime as by giving an excuse." *Id.* at 381.

[8]In *Babbitt v. Calderon*, 151 F.3d 1170, 1178-79 (9th Cir. 1998), reviewing the application of the factor (k) instruction to evidence of Babbitt's background, we noted the Supreme Court's holding in *Boyde* that the instruction did not mislead the jury to exclude consideration of Boyde's background and character evidence. *Babbitt* did not address the issue, squarely presented here, of the applicability of the factor (k) instruction to post-crime evidence.

Mitigation evidence occurring after the crime cannot possibly "extenuate the gravity of the crime." Because the unadorned factor (k) instruction does not encompass post-crime evidence, it violates *Skipper*'s requirement that the jury be permitted to consider post-crime good behavior as mitigating evidence in deciding whether to impose the death penalty. *See* 476 U.S. at 5. Standing alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence.

2. The conflicting legal arguments of counsel

[5] The trial court's failure to correct the prosecutor's erroneous interpretation of that instruction, by compounding the potential for confusion inherent in the text of the factor (k) instruction, roots more deeply our conclusion that there was constitutional error. There is no dispute that the prosecutor impermissibly narrowed the scope of factor (k) when he argued to the jurors that the factor did not "refer to anything after" the crime "or later" and that they should not consider Payton's evidence in mitigation. *See Payton*, 839 P.2d at 1048 ("It is true that the prosecutor during closing argument suggested a narrow and incorrect interpretation of factor (k)."); *see also Payton*, 258 F.3d at 916 ("In this case, there is no question that the prosecutor misstated what factor (k) refers to.").

The prosecutor's statements further distinguish this case from *Boyde*. The prosecutor in *Boyde* "never suggested that the background and character evidence could not be considered." 494 U.S. at 385. In contrast, the prosecutor here told the jurors that the statutory list of factors precluded them from considering the *only* mitigating evidence Payton presented — evidence of a post-crime religious conversion and its positive effects on other inmates and the administration of the jail. When a natural reading of the unadorned factor (k) instruction already favored the prosecutor's stance, defense counsel faced an imposing hurdle to convince the jury of the proper interpretation.

3. The absence of instruction from the trial court

We recognize that arguments of counsel generally carry less weight with a jury than instructions from the trial court. *Boyde*, 494 U.S. at 384. The trial court, however, did nothing to level this uneven playing field. Over the objection of Payton's counsel, the trial court decided to allow each attorney to argue his own legal interpretation to the jury, rather than instructing the jury as to which interpretation was correct. In contrast, the Supreme Court's holding in *Boyde* that the jury understood the scope of factor (k) relied heavily on the trial court's clarifying instruction allowing the jury to consider "*any other circumstance* that might excuse the crime," which included the defendant's background and character. *Id.* at 381-82 & n.5 (emphasis in original).

[6] Here, the only "curative" instruction given was that the comments by the prosecutor and the defense counsel were not evidence. The ineffectiveness of the trial court's instruction is clear from the prosecutor's return, after the trial court's admonition, to his argument to the jury that factor (k) did not encompass Payton's mitigating evidence.

[7] Nor did the trial court's final instructions to the jury cure the error here. Before the jury retired to deliberate, as noted, the trial court instructed:

> In determining the penalty to be imposed on thedefendant, you shall consider all of the evidence which has been received during any part of the trial in this case, *except as you may be hereafter instructed.* You shall consider, take into account and be guided by the following factors, *if applicable* . . . .

(emphasis added). The trial court's directive to "consider all of the evidence" failed to correct the prosecutor's error. In the

same breath, the trial court stated that the jury should consider all the evidence "except as you may be hereafter instructed" and then instructed them to be "guided by" the eleven-factor test. Thus, the trial court confined the jury's consideration of the evidence to the multi-factor test that the prosecutor had just declared did not allow consideration of Payton's extensive mitigating evidence. The judge then instructed the jury that it was to apply the factors only "if applicable."

[8] In effect, the court's instruction delegated to the jury the legal question whether factor (k) allowed consideration of Payton's mitigating evidence. Nothing prevented the jury from refusing to consider Payton's mitigating evidence and thereby reaching an unconstitutional result. *See Eddings,* 455 U.S. at 114-15 ("The sentencer . . . may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration."). When "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." *Griffin v. United States*, 502 U.S. 46, 59 (1991). We cannot expect a jury to reach the constitutionally correct conclusion that the multi-factor instruction compelled consideration of Payton's mitigating evidence when the jury must overcome both the text of factor (k) and the facially reasonable argument of the prosecutor. These circumstances likely stripped Payton of his only defense to the imposition of the death penalty.

[9] Thus, Payton has satisfied *Boyde*'s standard requiring that he establish that there was a reasonable likelihood that the jury applied the instruction in a way that prevented consideration of his mitigating evidence. *Boyde* does not require that Payton show that "the jury was more likely than not to have been impermissibly inhibited by the instruction." *Boyde,* 494 U.S. at 380. However, Payton's death sentence would be constitutional "if there is only a possibility of such an

inhibition." *Id.* In determining whether more than a "possibility" of inhibition existed, we do not limit our inquiry to how "a single hypothetical 'reasonable' juror could or might have interpreted the instruction." *Id.* The claimed error must amount to more than speculation about the jury's understanding of the instruction. *Id.*

Payton's claim is more than speculative. Compounding the nebulous terms of the unadorned factor (k) instruction were the prosecutor's erroneous argument and the trial court's silence as to the jury's constitutional obligation to consider all of the mitigating evidence. In *Easley*, the California Supreme Court stated that trial courts should, in instructing jurors on factor (k), tell juries that they can consider any aspect of the defendant's character or record. 671 P.2d at 826 n.10. Here, defense counsel asked for an instruction similarly clarifying the breadth of the scope of factor (k). Despite agreeing that it was a "catch-all provision," the trial judge refused. Instead, the jury was given the unadorned factor (k) instruction without any explanation by the court as to what was appropriate to consider under factor (k). In sum, the jury received the multi-factor instruction, including factor (k), on the same plate with the contentions of the prosecutor and defense counsel as to its applicability, and without further guidance from the trial court.

Penry v. Johnson, 532 U.S. 782 (2001), confirms our conclusion that there was a reasonable likelihood that the jury did not consider Payton's mitigating evidence. There, the Supreme Court condemned a similar tripartite error consisting of a jury instruction that excluded consideration of Penry's mitigating evidence, the prosecutor's exhortation to the effect that the jury should follow that instruction, and the trial court's failure to provide a "vehicle" for the jury to "express[ ] the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 804. In emphasizing that the

jury must be able to "consider and give effect to a defendant's mitigating evidence in imposing sentence," the Court stated:

> [I]t is only when the jury is given a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence.

Id. at 797 (internal quotations, brackets, italics, and citations omitted).

[10] *Penry* reminds us that we presume that jurors follow their instructions.[9] *Id.* at 799. When the effect of a mitigation instruction, viewed in the full context of the trial, is to confuse or mislead the jury in its duty to consider all relevant mitigation evidence, there has been constitutional error. By labeling the prosecutor's incorrect contentions mere "argument," the trial court not only failed to correct a critical misstatement of law but also effectively instructed the jury *to consider* the prosecutor's

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[9]The dissent's reliance on *Weeks v. Angelone*, 528 U.S. 225 (2000) is misplaced. In *Weeks*, the Supreme Court considered an instruction that it had previously determined was unambiguous standing alone. *Id.* at 231 (citing *Buchanan v. Angelone*, 522 U.S. 269 (1998)). In contrast, the Supreme Court in *Boyde* determined that the factor (k) instruction was constitutional by relying heavily on the trial judge's clarifying instruction to the jury about its meaning. Moreover, in *Weeks*, the Supreme Court emphasized that the trial judge had separately instructed the jury to consider all mitigating circumstances. This is almost exactly the instruction that Payton's defense counsel requested and that the trial judge rejected. *Id.* at 231-32.

erroneous legal position. *See Caldwell v. Mississippi*, 472 U.S. 320, 339 (1985). This directive is sufficient to establish constitutional error.

C. Harmless error

Having concluded that an error of constitutional magnitude impacted the penalty phase of Payton's trial, we turn to whether that error was nevertheless harmless. We hold that the error had a "substantial and injurious effect or influence" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Our jurisprudence is divided as to whether the petitioner or the state, or neither, bears responsibility for demonstrating the significance of the error under the *Brecht/O'Neal* harmlessness standard. *Compare Rodriguez v. Marshall*, 125 F.3d 739, 744 (9th Cir. 1997) (stating that petitioner bears the burden of showing harm); *Franklin v. Henry*, 122 F.3d 1270, 1273 (9th Cir. 1997) (same); *with Keating v. Hood*, 191 F.3d 1053, 1062 (9th Cir. 1999) (as amended) (noting that the state bears the burden of showing harmlessness); *Fisher v. Roe*, 263 F.3d 906, 917 (9th Cir. 2001) (same); *and with Gray v. Klauser*, 282 F.3d 633, 651 (9th Cir. 2002); *Thompson*, 74 F.3d at 1575 (rejecting burdens of proof in favor of an independent determination of whether a trial error had a substantial and injurious effect).[10]

It is clear from *O'Neal* that the petitioner does not bear the burden of showing harm. 513 U.S. 437-45. Because the harmless error analysis is a purely legal question that lies outside the realm of fact-finding, we dispense with burdens of

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[10]This inconsistency was previously noted in *Mancuso v. Olivarez*, 282 F.3d 728, 737 n.4 (9th Cir.), *as amended* ___ F.3d ___ (2002), and the court there attempted to clarify the issue. Our analysis here is not inconsistent with *Mancuso*.

proof and presumptions. *See O'Neal*, 513 U.S. at 437 (explaining that the court must determine whether the error affected the judgment "without benefit of such aids as presumptions or allocated burdens of proof that expedite fact-finding at the trial" (quoting R. Traynor, The Riddle of Harmless Error 26 (1970)). *O'Neal* directs us to ask a "conceptually clearer" question in reviewing the record in a habeas case: "Do I, the judge, think that the error substantially influenced the jury's decision?" 513 U.S. at 436.

In the course of this inquiry, it is the State that bears the "risk of doubt." *Id.* at 438. When issues arise during our analysis which create uncertainty, the petitioner is entitled to the benefit of the doubt. *See id.* at 436, 438-43. At the close of our inquiry, we step back to determine where we are on the spectrum of certainty about the harmlessness of the constitutional error. If we are convinced that "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *Id.* at 437 (quoting *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)). If, on the other hand, we are not fairly assured that there was no effect on the verdict, we must reverse. *Id.*; *Gray*, 282 F.3d at 651. In the "narrow circumstance" in which we are in "grave doubt" as to the effect of the constitutional error, we must assume that there was such an effect, and grant the petition. *O'Neal*, 513 U.S. at 437; *see also Thompson,* 74 F.3d at 1575.

Thus, we look to the State to instill in us a "fair assurance" that there was no effect on the verdict. *Gray*, 282 F.3d at 651; *United States v. Hitt*, 981 F.2d 422, 425 (9th Cir. 1992); *see also O'Neal,* 513 U.S. at 443 ("[T]he State normally bears responsibility for the error that infected the initial trial."). Only if the State has persuaded us that there was no substantial and injurious effect on the verdict do we find the error harmless.

This framework is faithful to the balance the Supreme Court has struck between concerns of federal-state comity and finality in state criminal trials, and the irreversible harm caused by an execution resulting from an unconstitutional error. In weighing these concerns in a non-capital case, the Supreme Court has stated:

> [T]he number of acquittals wrongly caused by grant of the writ and delayed retrial (the most serious harm affecting the State's legitimate interests) will be small when compared with the number of persons whom this opposite rule (denying the writ) would wrongly imprison or execute. On balance, we must doubt that the law of habeas corpus would hold many people in prison "in violation of the Constitution," for fear that otherwise a smaller number, not so held, may eventually go free.

O'Neal, 513 U.S. at 443. Placing the "risk of doubt" on the state is also consistent with the body of jurisprudence that has placed the burden of showing lack of prejudice on the party who would benefit from the constitutional error. *Id.* at 437-44; *United States v. Olano*, 507 U.S. 725, 741 (1993) (stating that the government bears the "burden of showing the absence of prejudice"); *Chapman v. California*, 386 U.S. 18, 24 (1967) (noting that "the original common-law harmless-error rule put the burden on the beneficiary of the error . . . to prove that there was no injury"). *Kotteakos*, which articulated the harmlessness standard that *Brecht* later adopted and that we now apply, "places the burden on prosecutors to explain why those errors were harmless." *O'Neal,* 513 U.S. at 438-39 (quoting *Brecht,* 507 U.S. at 640 (Stevens, J., concurring) (citing *Kotteakos*, 328 U.S. at 760)).[11]

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[11]To the extent that they are inconsistent with this opinion, we overrule the statements in *Rodriguez*, 125 F.3d at

Considering the record before us, the State has not provided us with a "fair assurance" that the error did not prejudice the penalty phase of Payton's trial. *O'Neal,* 513 U.S. at 437-38; *Gray*, 282 F.3d at 651. On one side of the balance sheet is Respondent's evidence of aggravating circumstances. There is no question that this was a brutal crime. The prosecution introduced eyewitnesses to Payton's actions, testimony as to his motives and character, and forensic and other evidence to demonstrate to the jury the devastating effects of the crime.

It is the other side of the balance sheet that undermines any assurance that the jury's verdict was not affected. As required by California Penal Code § 190.3, the trial court further instructed the jury that "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death." We have determined that there is a reasonable likelihood that the jury accepted the prosecutor's statement of the law rather than the defense counsel's and that it therefore failed to consider the only evidence offered in mitigation of the death penalty. That left the jury bereft of any countervailing evidence to weigh against the prosecution's evidence of aggravating circumstances.

We cannot know whether the jury would have returned a verdict of life or of death had it been properly instructed. Payton's extensive evidence of his conversion to Christianity, positive influence on other inmates, and other good works in jail were offered to evoke to the jury his potential for

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744; *Franklin*, 122 F.3d at 1273; and *Thomas v. Hubbard*, 273 F.3d 1164, 1170 (9th Cir. 2002) (as amended) that appear to place the burden on the petitioner to establish that there was harm under *Brecht.*

rehabilitation.[12] If the jury had been inclined to weigh favorably evidence of redeeming features of his character or his conduct while in custody pending trial, it would have felt constrained by law from considering that evidence. Without Payton's mitigating evidence, the jury was bound by California Penal Code § 190.3 to impose a death sentence. *See Easley*, 671 P.2d at 827.

[11] Having pondered "all that happened without stripping the erroneous action from the whole," we do not arrive at a fair assurance that the error was harmless. *Gray*, 282 F.3d at 651 (*quoting O'Neal*, 513 U.S. at 437). As we have previously stated, "[b]ecause a death sentence is qualitatively different from other forms of punishment, there is a greater need for reliability in determining whether it is appropriate in a particular case." *Coleman v. Calderon*, 210 F.3d 1047, 1050 (9th Cir. 2000); *see also Mills v. Maryland*, 486 U.S. 367, 376 (1988)

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[12]The dissent questions the sincerity of Payton's religious beliefs, calling his conversion a "miracle on the cellblock" and a "fortuitous epiphany." *Infra*, at 10787, 10793. The testimony in mitigation permits a different inference. Payton's pastor testified that as a high school student Payton involved himself with a church group for several years. Reinitiating contact with the church after his arrest is consistent with his actions as a high school youth. Ultimately, resolving the question of the depth of Payton's beliefs demands the kind of sifting and weighing of the evidence that is the jury's exclusive realm. *Skipper*, 476 U.S. at 9 (remanding for new penalty phase trial when exclusion of post-crime mitigating evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender"). We steer clear of determining the value of the evidence in favor of ensuring that the jury had the opportunity to decide for itself whether Payton's religious beliefs were merely "fortuitous."

("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."). Far from a fair assurance that the error was harmless, the "possible jury confusion" arising from the trial court instruction leaves us in "grave doubt about the likely effect of [the] error on the jury's verdict." *O'Neal,* 513 U.S. at 435; *see also Fisher*, 263 F.3d at 917-18. We conclude, therefore, that the instructional error had a "substantial and injurious effect or influence on the jury's verdict" that necessitates a new penalty phase trial. *See Coleman*, 525 U.S. at 147. Payton is entitled to a penalty trial before a jury that is properly instructed that it must take his post-crime evidence into account in determining whether to impose a sentence of life or death.

Conclusion

Accordingly, we AFFIRM the judgment of the district court granting Respondent's motion for summary judgment as to all claims except Claim IVB, item 3 of the Petition for Habeas Corpus, and granting the writ of habeas corpus as to the penalty phase of the trial.

AFFIRMED.

TALLMAN, Circuit Judge, concurring in part and dissenting in part, joined by KOZINSKI, TROTT, FERNANDEZ & T.G. NELSON, Circuit Judges:

I respectfully dissent from most of the court's opinion. In *Boyde v. California*, 494 U.S. 370 (1990), the Supreme Court upheld against an Eighth Amendment challenge the same CALJIC jury instruction employed in Payton's penalty trial. I do not believe the result should be any different in this case because it is not reasonably likely that the prosecutor's incorrect remarks led jurors to understand the instructions as precluding consideration of all of the defendant's mitigating evidence, *i.e.*, virtually the entire penalty phase case. Moreover, if there was an error, it was surely harmless.

I base my conclusion on the following factors: (1) The jury was properly admonished by the trial judge on the point that "counsel's arguments are not evidence and must be judged in the context in which they are made" when the defense objected to the prosecutor's error and moved for a mistrial; (2) the prosecutor later implicitly conceded in his closing argument that the jury could consider the defendant's claimed religious conversion although he argued it was entitled to very little weight; (3) defense counsel's closing argument cured any misimpression the prosecutor might have left; (4) no rebuttal argument was permitted by the trial court; and (5) if the narrow view of Cal. Penal Code § 190.3(k) urged by the prosecutor had been accepted by the jury it would have necessarily had to ignore all of the penalty phase evidence except for 11 pages of testimony by prosecution witnesses.

In addition, we must remember that Payton's jailhouse conversion was heard by the jury in its proper context — after Payton was apprehended for raping and murdering one individual and attempting to murder two others. The court's

opinion makes much of one jury instruction and a few erroneous comments by the prosecutor. But it was Payton's crime — barely described by the majority — for which the jury sentenced him to death.

In the wee hours of the morning of May 26, 1980, William Charles Payton arrived at the Garden Grove, California, home of Patricia Pensinger. Payton, who had once been a boarder in Pensinger's home, found Pensinger awake and working on a crossword puzzle in the kitchen. He informed her he was experiencing car trouble. Pensinger graciously welcomed Payton into her home and offered him some beer, which he drank while talking with Pensinger until about 4:50 a.m. During their conversation, Pamela Montgomery, a boarder temporarily residing at Pensinger's home, entered the kitchen. Pensinger introduced her to Payton. Montgomery, who was staying with Pensinger while her husband was on duty with the National Guard, filled a glass with water, then left the kitchen and returned to her bedroom. Payton asked Pensinger if he could sleep on the living room couch and Pensinger said he could.

While everyone else in the house was fast asleep, Payton repaid Pensinger for her hospitality by waking her with two blows to her back, stabbing her 40 times on her face, neck, back and chest, and stabbing her ten-year-old son, Blaine, 23 times in the face, neck and back. Miraculously, both Pensinger and her son survived. Pamela Montgomery was not so lucky. Her body was found after Payton fled the Pensinger residence. He returned to his own home where his wife saw him covered in blood. Forensic evidence suggested that Payton stabbed Mrs. Montgomery 12 times either during sexual intercourse, or that he raped her while she lay comatose from her wounds bleeding to death.

Payton's trial counsel conducted an investigation into Payton's background and the events of the night of the murder. He consulted with mental health experts. Defense counsel elected not to call any witnesses during the guilt phase of trial, and the jury convicted Payton on all counts. The jury found the special circumstance that Payton had committed aggravated murder while engaged in the commission of rape or attempted commission of rape.

During the penalty phase, the prosecution presented evidence concerning Payton's jailhouse admission that he had a "severe problem with sex and women," and that he would "stab them and rape them." He also admitted that he had previously stabbed a former girlfriend (who survived to testify against him). Defense counsel responded by trotting out eight witnesses to testify that Payton had made a genuine commitment to God after being jailed for the commission of the crimes and while awaiting trial. "Their testimony, taken as a whole, tended to show that Payton had been 'born again,' made a sincere commitment to God, and was performing good works in jail." Slip op. at 10763.

During closing argument, the prosecutor stated that he did not believe Payton's post-crime religious conversion was "really applicable" or "comes in under any of the eleven [mitigating] factors." Although the last factor, factor (k), was designed to be a catchall and covered "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," Cal. Penal Code § 190.3(k) (1978), the prosecutor contended that factor (k) "doesn't refer to anything after the fact or later."

The judge admonished the jurors that the arguments of counsel did not constitute evidence and that the jury must consider all of the evidence when determining Payton's penalty. The jury decided that Payton should be put to death.

The California Supreme Court affirmed the sentence five to two. *See People v. Payton*, 839 P.2d 1035 (Cal. 1992), *cert. denied*, 510 U.S. 1040 (1994). Our three-judge panel held that the federal writ of habeas should not issue in this case. But our court en banc today, by a slim majority, refuses to recognize the jury verdict, a verdict that was upheld by the California Supreme Court, in Payton's penalty phase trial, reasoning that (1) the Supreme Court's decision in *Boyde* does not dictate the outcome where the defendant sought to admit solely post-crime evidence; (2) the process that the Supreme Court adopted in *Boyde* for evaluating instructional error leads to the conclusion that there was constitutional error in this case; and (3) the error was not harmless.

Because I disagree with these conclusions and the court's ultimate holding, I respectfully dissent.

I

I concur in the court's decision not to disturb the underlying conviction and to reject most of Payton's challenges to both his conviction and sentence. Slip op. at 10761-62 n.1. None of our eleven judges supports Payton's argument that he received ineffective assistance of counsel at either the guilt or penalty stages of trial. Even though defense counsel did not present any witnesses, not a single member of this en banc panel believes that Payton was prejudiced with respect to the guilt phase in light of the overwhelming evidence against him. Nor does a single judge believe "there is a reasonable probability that, absent [any errors of defense counsel], the sentencer — including an appellate court, to the extent it independently reweighs the evidence — would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

II

The court nonetheless affirms the district court's grant of a writ of habeas corpus based on instructional error, holding that there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the "consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380; slip op. at 10767. The court's opinion correctly notes that a year *after* the jury announced Payton's death sentence, the California Supreme Court acknowledged that factor (k) might cause juror confusion. *See People v. Easley*, 671 P.2d 813, 825-26 & n.10 (Cal. 1983); slip op. at 10770.[1] Our opinion also acknowledges that the United States Supreme Court examined this exact same instruction in a capital case in *Boyde* and held that the language of the instruction did not violate the Eighth Amendment, *see* 494 U.S. at 386, and that there was not a "reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Id.* at 380.

Our court first tries to distinguish Payton's case by limiting the holding in *Boyde* to the conclusion that "the factor (k) instruction was not ambiguous as applied to *pre-crime* background and character evidence as long as the trial court

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[1]Though noting the potential for confusion in the instruction itself, the California Supreme Court reversed the death sentence in *Easley* because "the trial court not only failed affirmatively to advise the jury that it *could* consider as a mitigating factor any aspect of the defendant's character or background, but it expressly — and inaccurately — informed the jury that it *must not* be influenced by sympathy or pity for the defendant." 671 P.2d at 826 (emphasis in original). The trial court did not commit those errors at Payton's penalty phase trial, and, in fact, specifically told the jury to consider all of the evidence.

provided clarification of its meaning." Slip op. at 10770 (emphasis added). *Boyde* should not be read so narrowly. The central issue in *Boyde*, as in Payton's case, as in any challenge to factor (k), is whether factor (k)'s language limits the jury to consideration of evidence only directly related to the crime. The Supreme Court emphatically rejected such a reading. *See Boyde*, 494 U.S. at 382 ("The instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstance *of the crime* which extenuates the gravity of the crime.' The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character.") (emphasis in original); *see also id.* at 383 (finding it "improbable that jurors would arrive at an interpretation that [factor (k)] precludes consideration of all non-crime-related evidence").[2]

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[2]"Extenuate" is defined "[t]o make less severe; to mitigate." BLACK'S LAW DICTIONARY 604 (7th ed. 1999). "Mitigate" is defined as "[t]o make less severe or intense." *Id.* at 1018. It is difficult to argue that a murder is less severe because of either pre-crime or post-crime circumstances pertaining to the murderer. The victim is dead in either case. But under Cal. Penal Code § 190.3, the defense is allowed to present whatever constitutionally relevant evidence it wants to persuade the jury to spare the defendant's life, and the jury may choose to spare the defendant's life based on any evidence it concludes "extenuates the gravity of the crime" even though it is "not a legal excuse for the crime" and even though it does not literally make the crime any less "severe." As the Supreme Court stated in *Skipper v. South Carolina*, 476 U.S. 1 (1986), "[a]lthough it is true that [favorable] inferences [drawn from the defendant's good behavior while in prison] would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be 'mitigating' in the sense that they might serve as a basis for a sentence less than death." *Id.* at 4-5 (citation and quotation

Just because Boyde's "disadvantaged background and his character strengths in the face of those difficulties," 494 U.S. at 382 n.5, was the evidence in question in that case does not mean post-crime evidence should be viewed differently. Once one acknowledges, as the Supreme Court did in *Boyde*, that factor (k)'s text allows for consideration of evidence beyond the crime itself, there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths or are any more excluded from a reading of factor (k).

Moreover, as both the Supreme Court in *Boyde* and our court's opinion here recognize, factor (k) allows jurors to consider a defendant's character. And that is basically what defense counsel tried to show during the penalty phase — that Payton had undergone a character transformation after being jailed. He had turned away from his former evil ways and toward God; he no longer sought to harm and abuse, stab and rape women; instead, he sought to help his fellow male inmates. He presented a significant amount of evidence to that effect, and the jury listened to it. We must presume the jury considered it. Unfortunately for Payton, the jury either did not believe this miracle on the cellblock or did not value it much in comparison to the horrific crimes he committed. The court seems unwilling to believe that jurors could easily apply their own common sense in considering what weight to give this defense evidence.

III

Assuming arguendo that *Boyde's* holding must be limited to pre-crime evidence so that the case left open "the question whether, on its face, the unadorned factor (k) instruction is

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omitted). The problem here is that the evidence offered by Payton was unlikely to persuade a jury that it mitigated the awful things that he had done.

unconstitutionally ambiguous as applied to post-crime evidence[,]" slip op. at 10770, I still would not find constitutional error in this case.

Boyde tells us that when evaluating "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" we must examine the instruction in "the context of the proceedings." 494 U.S. at 380, 383. The defense presented no witnesses during the guilt phase of trial, but eight witnesses — Payton's mother, his pastor, the director of a religious organization that ministered to prisoners, a deputy sheriff, and four inmates — testified during the penalty phase. These individuals testified that after his arrest Payton had genuinely committed himself to God, and, as a result, he had a calming effect on other prisoners.[3]

In closing argument the prosecutor incorrectly stated that factor (k) "doesn't refer to anything after the fact or later," whereupon the trial court immediately admonished the jury that comments made by counsel were argument, not evidence. I do not understand why we should not accord this standard admonishment the respect we normally afford it in non-capital cases. Juries are presumed to follow such admonitions absent specific proof that jurors did not. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

The prosecutor's arguments were also of concern in *Boyde*, and the Supreme Court stated:

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[3]No defense witnesses were excluded from testifying on Payton's behalf, thus distinguishing this case from *Skipper v. South Carolina*, where the trial court excluded as irrelevant witnesses who would have testified that the defendant had "made a good adjustment" while in prison. 476 U.S. at 3.

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the court. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

Boyde, 494 U.S. at 384-85 (internal citations omitted).

The prosecutor erred again by arguing that the jury had not heard "any legal evidence in mitigation," but for the majority of his closing, the prosecutor did what he should have done and argued not that jurors could not consider Payton's religious conversion but that they should not *value* it much. The prosecutor argued that the religious conversion would not seem to "lessen the gravity of the offense"; that the defense evidence was offered "to win [the jury's] sympathy"; that Payton's new-found religion could not undo his bad acts from the past; and that while Payton appealed to the jurors' mercy, he had not shown any to his victims. The prosecutor also implicitly acknowledged that the evidence presented by the defense counted for *something* when he stated "[i]f you want to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery."

In its closing, the defense stressed that the jury certainly could consider Payton's post-crime religion under factor (k) and

argued "[i]f that's not applicable and that therefore all the evidence we presented is not applicable, why didn't we hear any objections to its relevance?"[4] When the prosecutor objected at this point, the court said it would not repeat its admonition. Nor did it allow the prosecution opportunity for closing rebuttal argument.

When delivering the jury instructions, the trial court stated:

> In determining the penalty to be imposed on the defendant, you shall consider *all of the evidence* which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . . .
>
> (k), Any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime.

(emphasis added).

The court apparently believes the key language in that instruction is not "all of the evidence" but rather "as you may be hereafter instructed" and holds that the combination of this instruction with the prosecutor's error left the jury on its own to determine whether or not to consider Payton's post-crime

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[4]Defense counsel's rhetorical question speaks for itself. Why, indeed, would the prosecutor not object to the post-crime evidence if it was entirely irrelevant? Even more to the point, why would the trial judge compel the jurors to sit through a parade of eight witnesses if jurors were not allowed to consider their testimony?

religious conversion. Slip op. at 10773. This hardly seems likely. The jurors heard eight witnesses testify as to Payton's religious conversion; they were told arguments by counsel were not evidence; they were told to consider *all of the evidence*; and they were not told to ignore post-crime evidence, or all of the defendant's evidence. Thus, the instruction effectively told jurors they could consider post-crime evidence under factor (k).[5]

We presume the jury followed the court's instructions and considered all of the evidence presented at both phases of trial. *See Weeks*, 528 U.S. at 234. One may disagree with the jury's decision, but it is not reasonable to contend that the jury was not in the proper position to render a fully informed verdict. The

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[5]The court in this case accepts what the Supreme Court rejected in *Weeks v. Angelone*, another capital case in which the jury instructions might not have been as clear as they could have been. In that case, the jury asked the judge whether it had to choose the death penalty if it found that the defendant met one of the criteria that made the death penalty an option. The trial court referred the jury to an instruction that stated that "[i]f the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives [that made the death penalty an option], then you shall fix the punishment of the defendant at life imprisonment." 528 U.S. at 229-30. The Supreme Court rejected the argument that the trial court had a duty to inform the jury (in part because defense counsel did so in closing argument) that even if it found the defendant eligible for the death penalty it could impose a penalty of life imprisonment. It affirmed the denial of the writ of habeas corpus, stating, "[a]t best, petitioner has demonstrated only that there exists a slight *possibility* that the jury considered itself precluded from considering mitigating evidence. Such a demonstration is insufficient to prove a constitutional violation under *Boyde*, which requires the showing of a reasonable *likelihood* that the jury felt so restrained." *Id.* at 236.

effect, if any, of a jailhouse religious conversion on a defendant's character is a question readily discernible by jurors, who are probably better suited to weigh its value in mitigation than are judges.

IV

Even if we were to assume that an instructional error rising to the level of a constitutional violation occurred in Payton's case, his is not the case to overturn a jury's sentence, one that has been affirmed by the California Supreme Court.

Before conducting harmless error analysis, however, I must fault our court's approach for determining whether an error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). While the court initially states that "the harmless error analysis is a purely legal question that lies outside the realm of fact-finding [so that] we dispense with burdens of proof and presumptions[,]" slip op. at 10777, it quickly forgets this and places the burden on the state. Slip op. at 10778 ("Placing the 'risk of doubt' on the state is also consistent with the body of jurisprudence that has placed the burden of showing lack of prejudice on the party who would benefit from the constitutional error.").

While noting that our prior decisions have not been a model of clarity or consistency, we recently clarified that "the reviewing court must determine independently whether a trial error had a substantial and injurious effect, without consideration of burdens of proof." *Mancuso v. Olivarez*, 292 F.3d 939, 950 n.4 (9th Cir. 2002) (as amended). It is true that "[w]hen a federal judge in a habeas proceeding is *in grave doubt* about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must

win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (emphasis added). But "grave doubt[ ] is unusual," *id.* at 435; *normally*, there are no burdens. *See id.* In most cases, the judge simply asks, "Do I, the judge, think that the error substantially influenced the jury's decision?" *Id.* at 436.

Whatever problems previously existed with our case law, the court today makes them worse by overruling only those that placed a burden on the petitioner, slip op. at 10778-79 n.11, without also overruling those that placed a burden on the state absent grave doubt. *See, e.g., Keating v. Hood*, 191 F.3d 1053, 1062 (9th Cir. 1999) (as amended); *Fisher v. Roe*, 263 F.3d 906, 917 (9th Cir. 2001). Only where there is grave doubt do we get to burdens. And there is no need for that in this case.

As previously noted, no judge finds merit in the ineffective assistance of counsel claims even though defense counsel presented no witnesses during the guilt phase and the eight witnesses who testified during the penalty phase focused on Payton's post-crime conversion. While the court uses this to distinguish *Boyde* in Payton's favor by concluding that there is a reasonable likelihood jurors did not consider the evidence offered on Payton's behalf, what it really indicates is that the defense had hardly anything to offer that could have persuaded a jury to spare Payton's life. William Charles Payton did not suffer from mental illness; he was not "made bad" by his upbringing; he was not a generally good person who did one heinous act out of character; and he was ably defended by competent counsel. On this record, the jury could easily find that William Charles Payton was a vile human being who chose a despicable path in life that culminated in a series of heinous crimes on the morning of May 26, 1980.

Had Payton changed by the time of his trial and sentencing? Who knows? We do know that the jury heard evidence of his post-crime religious conversion. The

conversion may have counted for something, but it was up to a jury two decades ago to decide how to value his fortuitous epiphany. Certainly, there might have been substantial doubt concerning Payton's sincerity given the timing of his religious conversion, but even if the commitment were sincere, the jury may very well have concluded that such matters concerned Payton's soul, not his life.

The jury heard all of the evidence and determined that Payton should forfeit his life for the life he took and the injuries he inflicted on the surviving victims, who must live with the horrible memories of what he did to them. I believe Payton's jury, unlike a majority of the court today, had the ability to make a fully informed and incredibly difficult decision as to whether an individual who has been found guilty of a capital offense deserves to die for the awful crimes he committed.[6]

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[6]Rather amazingly, the court apparently believes that it is upholding the right of jurors to determine whether the sentence of death is to be imposed and that the dissent is just second-guessing the genuineness of Payton's religious conversion. Slip op. at 10779-80 n.12. Nothing could be further from the truth. I fully support the jury verdict in this case and would reinstate it as our three-judge panel did. It is the majority that is recasting Payton's religious commitment — sifting through the record to discover that in high school Payton was involved with a church group, thus apparently indicating a lifelong commitment to a religious way of life. Perhaps he was an otherwise pious man who occasionally lapsed to the dark side. The jury applied its common sense in judging the merits of Payton's defense. It is the court's opinion that is bent on disregarding the penalty that the jury by its verdict believed was appropriate because my colleagues disagree with the jury's decision.

It is true that in death penalty cases we ask for a higher standard to affirm the sentence, *see Coleman v. Calderon*, 210 F.3d 1047, 1050 (9th Cir. 2000), but that does not mean that a trial must be error-free. No trial is or can ever be perfect; and we can never know for certain that a jury considered all the evidence in reaching a verdict. We try to assure they do and the trial court did so here.

Our job today is to ask: "Do [we, as judges], think that the error substantially influenced the jury's decision?" *O'Neal*, 513 U.S. at 436. Common sense tells us the answer is no. Abstract legal discussions are important in the development of the law, but so is the ability to look at the impact of those abstract decisions in the context of the real world. Any legal errors in this case were harmless in relation to the acts committed by the man who stood before the jury and asked it to mitigate his sentence based solely on his change of heart after he was caught.

V

I fear that as we wrestle with the fate of a defendant facing the ultimate penalty of death, we have elevated form over substance and cloaked our habeas decision in the mantle of a federal constitutional requirement when the Supreme Court told us in *Boyde* the Constitution contemplates no such thing. In the process, one wonders whether our court has lost its conscience and no longer listens to the silent screams of the victims, who are also entitled to justice; nor considers the impact of its decisions on the safety of our communities, which are equally entitled to protection from recidivists like William Charles Payton. I would reverse the district court's decision to issue the writ of habeas corpus and reinstate the holding as set forth in the opinion of the California Supreme Court and the decision of our three-judge panel.

APPENDIX D

APPENDIX D

[Filed August 2, 2001]

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM CHARLES PAYTON, *Petitioner-Appellee*, v. JEANNE WOODFORD, Acting Warden, of California State Prison at San Quentin *Respondent-Appellant.*	No. 00-99000 D.C. No. CV-94-04779-R

WILLIAM CHARLES PAYTON, *Petitioner-Appellee*, v. JEANNE WOODFORD, Acting Warden, of California State Prison at San Quentin *Respondent-Appellant.*	No. 00-99003 D.C. No. CV-94-04779-R OPINION

Appeals from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted En Banc
May 10, 2001----Pasadena, California

Filed August 2, 2001

Before: Pamela Ann Rymer, Michael Daly Hawkins, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Rymer;
Partial Concurrence and Partial Dissent by Judge Hawkins

COUNSEL

Nancy Palmieri, Deputy Attorney General, San Diego, California, for the respondent-appellant/cross-appellee.

Rosalie L Rakoff, Santa Monica, California, for the petitioner-appellee/cross-appellant

Dean R. Gits, Sant Monica, California, for the petitioner-appellee/cross-appellant.

OPINION

RYMER, Circuit Judge:

William Charles Payton was convicted in 1982 of the rape and murder of Pamela Montgomery, and the attempted murders of Patricia Pensinger and her ten-year-old son, Blaine. He was sentenced to death. The California Supreme Court affirmed. People v. Payton, 3 Cal.4th 1050, 13 Cal. Rptr. 2d 526 (1992). It found that the prosecutor made an incorrect argument in the penalty phase about "factor (k),"[1] -- that factor (k) does not refer to anything after the fact or later than the crime -- but held that

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[1]Factor (k) is the last of eleven mitigation factors and covers "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code § 190.3(k).

the error was harmless as it was not reasonably likely the jurors believed the law required them to disregard Payton's mitigating evidence. Payton filed a petition for habeas corpus in federal district court, which granted the writ on his claim of prosecutorial misconduct. The district court held that the penalty phase was rendered fundamentally unfair by the prosecutor's improper argument regarding the jury's consideration of mitigating evidence. Accordingly, the sentence of death was vacated until the state granted a new penalty trial and, if no retrial was held, Payton was to be sentenced to life imprisonment without the possibility of parole. His convictions for murder, rape, and attempted murder were left standing. The state appealed. We conclude that Payton's due process rights were not violated. It is not reasonably likely that the jury was misled into disregarding Payton's evidence because the prosecutor's incorrect statement was cured by the trial court's admonishment, the prosecutor's discussion of the substance of Payton's mitigating evidence, his concession that there was at least some merit to it, defense counsel's broad reading of factor (k), and the court's instruction that the jury "shall" consider "all" the evidence -- which necessarily included Payton's evidence in mitigation.

Payton cross-appealed. He sought a certificate of probable cause (CPC) on January 14, 2000, which the district court granted on February 16. However, on April 26, the Supreme Court held in Slack v. McDaniel, 529 U.S. 473 (2000), that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs any habeas appeal commenced after AEDPA's effective date, April 24, 1996, without regard to when the petition was filed. Consequently, Payton needs a certificate of appealability (COA) rather than a CPC for this court to have jurisdiction. Because Payton could not have known that a COA rather than a CPC was required,"we treat the petitioner's notice of appeal as a request for a COA on the issues raised in the briefs, and we grant a COA on those issues

as to which the petitioner has made the requisite `substantial showing of the denial of a constitutional right.' " Morris v. Woodford, 229 F.3d 775, 779 (9th Cir. 2000) (quoting Schell v. Witek, 218 F.3d 1017, 1021 n.4 (9th Cir. 2000)). We believe Payton has made such a showing and so grant a COA on the issues raised in his opening brief, but we agree with the district court on the merits that Payton's conviction must stand.

I

Payton was a former boarder at Patricia Pensinger's home. Around 4:00 A.M. on May 26, 1980, he entered the house through the front door and went to the kitchen. Pensinger was in the kitchen, and Payton told her that he had car troubles. Pensinger offered Payton some beer and the two talked until about 4:50 A.M. Montgomery came to the kitchen to get a drink of water and Pensinger introduced the two, although Montgomery left the kitchen shortly afterwards.

Payton asked if he could sleep on the couch in the living room, and Pensinger said okay. She then went to her bedroom, where Blaine was already asleep.

Pensinger was awaken by blows on her back. When she rolled over, Payton jumped on her and repeatedly stabbed her with a knife, primarily on her face and neck. The attack woke her son who was also stabbed when he tried to help his mother. Payton attempted to stab Pensinger in the abdomen but the knife would not penetrate because the blade had bent. Payton then left the bedroom yelling, "I'm leaving now."

Pensinger and her son tried to escape through the kitchen. But Payton was there. He grabbed another knife and began stabbing Pensinger and her son again, repeatedly. Eventually, others responded to the noise. Payton dropped the second knife and fled.

Both Patricia and Blaine Pensinger survived. In total, Patricia Pensinger suffered 40 stab wounds to her face, neck, back, and chest. Blaine Pensinger suffered 23 stab wounds to his face, neck, and back.

After the police arrived, Montgomery's body was discovered. Montgomery was found lying in a pool of blood on her bedroom floor, wearing only a nightgown that was open in the front. There was blood in the bedroom as well as a nearby bathroom. Underwear was found entwined in a pair of shorts in Montgomery's bed. Saliva and semen that was consistent with Payton's were found on the victim's breast and vaginal area. Montgomery had been stabbed 12 times; 6 of the stab wounds were in a line from Montgomery's stomach to her groin. She died approximately 15 to 30 minutes before she was found.

Payton arrived home at 6:15 A.M. His wife observed that his clothes, face, and hands were covered with blood (some of which was still wet). He had a cut on his index finger, and when he removed his clothes there was a "lot" of blood on his genital area as well as his legs and chest (but not on his pants). He also had fingernail scratches on his back. Payton fled, and was eventually arrested in Florida.

Payton was charged with the first degree murder, Cal. Penal Code § 187, and rape, Cal. Penal Code § 261(2), of Pamela Montgomery, and the attempted murders of Patricia Pensinger and Blaine Pensinger, Cal. Penal Code §§ 664 and 187. Trial counsel, James Merwin, was appointed on December 5, 1980. He and his investigator interviewed Payton's family (who basically painted the picture of an intelligent person raised in a middle-class background), and a couple of people who were at the party where Payton was before the murders (who indicated that he had been drinking and had apparently tried to assault two women sexually while there).

Merwin inherited the opinion of a mental health expert (Dr. Sheffner) retained by his predecessor that recounted Payton's past problems with sexual desires and concluded that Payton's claims of altered state of consciousness did not appear credible. Dr. Sheffner also opined that Payton's claims of amnesia or blackouts do not make medical sense or fit into any psychiatric-neurological pattern, that there was no evidence that Payton was in a psychotic state, and that his complaints of sleepwalking don't make sense. Merwin then retained Dr. E.W. Klatte, who interviewed Payton October 17, 1981 and reviewed several hundred pages of documentary material. Dr. Klatte discovered that Payton had consumed alcohol and drugs prior to the attack and had been looking for a woman to have "sexual relations" with. Payton admitted that some of the information he had given out to others was a lie, that he had problems dealing with women and sex, and sometimes worried that he was violent. He mentioned an incident with a former girlfriend he had stabbed while she was sleeping. Payton also told Dr. Klatte that his parents were kind to him, spoiled him, spent considerable time with him, and did not mistreat him. Dr. Klatte's opinion was that Payton was intelligent, well-oriented, and without evidence of organic brain pathology; that he was not unconscious at the time of the incidents; and that his use of cocaine six weeks before would not have precipitated the violence. In sum, he did not lack substantial capacity to appreciate the criminality of his conduct. After receiving Dr. Klatte's report, Merwin sought the views of one other mental health expert, Dr. Edward Kaufman. He gave Dr. Kaufman the same documentary material and Dr. Klatte's evaluation. Dr. Kaufman did not interview Payton, but rendered an opinion that was consistent with Dr. Klatte's.

Meanwhile, in October or November of 1980, Payton told a fellow inmate, Alejandro Garcia, that he had raped and stabbed Montgomery because he had "this urge to kill." In the same time frame he also began talking about the attacks with Daniel

Escalera, another inmate. Escalera was soon released but in late March, 1981 was re-incarcerated for violating probation. On April 3, Payton admitted to Escalera that he had a "severe problem" with women, that he wanted to "stab them and rape them," and that "all women on the street he seen was a potential victim, regardless of age or looks." Both Garcia and Escalera related what they had learned to the police. The prosecution disclosed their records (incomplete, as it turns out), and produced copies of their interviews. Merwin requested and obtained an evidentiary hearing pursuant to California Evidence Code § 402 to determine whether they were police agents, after which the trial judge found that neither was. Garcia testified in the guilt phase, and Escalera testified at the penalty phase.

The prosecution's case consisted of the law enforcement officers who observed the crime scene; forensics experts who testified that saliva and semen samples taken from Montgomery's body were consistent with Payton's; Patricia and Blaine Pensinger, who offered first-hand accounts; Payton's wife, who testified that she saw blood on Payton's penis as well as fingernail scratches and digs on his legs and back; and Garcia, who testified that Payton had admitted to the crime.[2] The defense called no witnesses.

Payton was convicted by the jury in the Superior Court for Orange County on all counts. The jury found true the special circumstance that the murder occurred while Payton was engaged in the commission or attempted commission of rape. Cal. Penal Code § 190.2(a)(17)(iii). The jury also found true that Payton used a deadly weapon (a butcher knife). Cal. Penal Code § 12022(b).

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[2]A friend of Montgomery also testified for the prosecution.

At the penalty phase, Escalera testified regarding his jailhouse conversations with Payton. In addition, Patricia Stone, Payton's former girlfriend, testified that she had once been awakened with Payton holding a kitchen knife to her neck. He began stabbing her chest and arms. The defense presented eight witnesses, including Payton's pastor, a deputy sheriff, four inmates, his mother, and the director of a religious organization that ministered to prisoners. They testified that Payton had made a sincere commitment to God, had a calming effect on other prisoners, and could help others while in prison through Bible study classes and a prison ministry.

During closing argument, both the prosecutor and Merwin discussed factor (k), one of the eleven mitigation factors jurors are to consider. Factor (k) permits consideration of "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The trial court had rejected Merwin's request to modify the standard Califoria jury instruction that described factor (k) in the language of the statute,[3] so that it would instead refer specifically to "evidence

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[3]California Jury Instructions, Criminal 8.84.1 (4th ed. 1979) (CALJIC). The instruction provides:

> In determining which penalty is to be imposed on[each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case,[except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
> (c) The presence or absence of any prior felony conviction.
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another.
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.
> (i) The age of the defendant at the time of the crime.
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
> (k) Any other circumstance which extenuates the gravity of the time even though it is not a legal excuse for the crime.

of the defendant's character, background, history, mental condition and physical condition." Nevertheless, the judge

indicated that counsel could argue the point. The prosecutor stated that "this doesn't refer to anything after the fact or later" and that he did not think that evidence of religion put on by Payton was "really applicable" or "comes in under any of the eleven factors." Merwin moved for a mistrial, which was denied. The judge admonished the jury that arguments of counsel are not evidence, and instructed the jury to consider all of the evidence. Merwin's closing argued that factor (k) was a catch-all that was designed to include the kind of evidence that Payton presented. Payton was sentenced to death.

Payton appealed, and filed a petition for habeas corpus in the California Supreme Court.[4] After neither succeeded, he sought a writ of certiorari in the United States Supreme Court, which was denied. Payton v. California, 510 U.S. 1040 (1994). On May 4, 1996, Payton filed a petition for writ of habeas corpus in the district court. The court granted Payton's request for investigative funds, but on August 2, 1996 ruled that certain issues had not been exhausted. It stayed further federal proceedings to allow Payton to exhaust. After exhausting these claims, Payton filed an Amended Petition (at issue here) on January 30, 1998. The court rejected Payton's request for additional funds on July 7, 1998, and again on January 14, 1999.

The state moved for summary judgment, which the court granted as to all claims but claim IV(B)(3), the factor (k) error, on which it granted the petition on June 1, 1999. Both parties filed motions to alter or amend the findings, which the court denied. The court issued a final order December 17, 1999

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[4]The California Supreme Court appointed a referee to hold an evidentiary hearing to consider Payton's habeas claim that a psychological defense based upon his combat experiences in Vietnam should have been presented at trial. The referee found that Payton's claims of combat experience were false.

resolving all remaining issues. The state appeals and Payton cross-appeals.

The State's Appeal

II

California asks us to reinstate Payton's death sentence for two reasons: first, the district court applied AEDPA incorrectly by refusing to give deference to the California Supreme Court ruling that the factor (k) error was harmless; and second, the record supports the California Supreme Court's ruling that the erroneous factor (k) argument was harmless. As for the first point, the state recognizes that our decision in Calderon v. United States Dist. Ct. ("Kelly"), 163 F.3d 530, 540 (9th Cir. 1998) (en banc) (holding that a petition for the appointment of counsel to prepare and file a habeas petition, coupled with a motion for a stay of execution, initiates the case), controls because Payton initiated his case before (although he filed his petition after) AEDPA's effective date. The state would like to see Kelly revisited, but this, of course, this panel cannot do. Accordingly, our review of Payton's petition is governed by pre-AEDPA standards.

Pre-AEDPA, Congress directed us that state court determinations of historical fact "shall be presumed to be correct." 28 U.S.C. § 2254(d) (West 1994). However, "[t]he application of a legal standard to historical facts does not constitute a factual finding entitled to a presumption of correctness under section 2254(d)." Thompson v. Borg, 74 F.3d 1571, 1573 (9th Cir. 1996) (quoting Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir. 1987)).

To establish prosecutorial misconduct, a petitioner must demonstrate that the prosecutor's closing "so infected the trial with unfairness as to make the resulting conviction a denial of

due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). "Improper argument does not, per se, violate a defendant's constitutional rights." Thompson, 74 F.3d at 1576 (quoting Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993)). If prosecutorial misconduct is established, and it was constitutional error, we then apply the Brecht[5] harmless error test. See Thompson, 74 F.3d at 1577 ("Only if the argument were constitutional error would we have to decide whether the constitutional error was harmless.").

The state contends that the California Supreme Court got it right and the district court got it wrong because proper application of Boyde v. California, 494 U.S. 370 (1990), in which the United States Supreme Court upheld the same CALJIC instruction on factor (k) that was used in this case, demonstrates that Payton was not deprived of his right to due process. In any event, the state submits, the prosecutor's erroneous statements were harmless.

Payton distinguishes Boyde by noting that unlike Boyde, no evidence was presented by the defense at the guilt phase in Payton's case; each of Payton's witnesses in the penalty phase testified only with respect to his post-arrest conduct whereas in Boyde, they testified to pre-arrest conduct; and the only indication in Boyde that the jury may have been precluded from considering relevant mitigating evidence was the ambiguous factor (k) instruction, while in Payton's case the prosecutor asserted that factor (k) was intended to refer only to events which extenuated the crime itself, not to events that occurred after its commission. Payton argues that this damage to his case was exacerbated by other instructions of the trial court that the jury could consider "all of the evidence which has been received during any part of this case, except as you may be hereafter

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[5]Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

instructed"; and that the jury"shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed" after "having heard and considered the argument of counsel." In Payton's view, this gives rise to a "reasonable likelihood" that the jury was misled into believing that it could not consider his evidence in mitigation, Boyde, 494 U.S. at 380, as well as extreme prejudice, because this was his only evidence in mitigation of the death penalty.

Boyde upheld the factor (k) instruction given in that case, and this one, against a challenge that it violated the Eighth Amendment by effectively precluding consideration of non-crime-related factors.[6] The Court concluded that there was

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[6]The instruction (CALJIC 8.84.1) states:

> In determining which penalty is to be imposed on[each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CALJIC 8.84.1 has since been amended. 1 California Jury Instructions, Criminal 8.85(k) (5th ed. 1988). See People v. Easley, 34 Cal.3d 858, 878, n.10, 196 Cal. Rptr. 309, 322 n.10 (1983) (indicating change should be made to avoid potential misunderstanding over meaning of factor (k)).

no reasonable likelihood that jurors interpreted the instruction to prevent consideration of background and character mitigating evidence. As it explained:

> Petitioner had an opportunity through factor (k) to argue that his background and character "extenuated" or "excused" the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, "long held by society," that in an appropriate case such evidence would counsel imposition of a sentence less than death. The instruction did not, as petitioner seems to suggest, limit the jury's consideration to "any other circumstance of the crime which extenuates the gravity of the crime." The jury was directed to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character.

Id. at 382 (emphasis in original). Of course, the problem in Payton's case is somewhat different because Payton's prosecutor argued to the jury that the religion evidence did not reduce the gravity of the crime as it happened later. The Court noted that the prosecutor in Boyde had not argued that Boyde's background and character evidence was irrelevant or should not be considered. Id. at 385. However, Boyde also asserted that the prosecutor's arguments there -- that Boyde's mitigating evidence did not suggest that his crime was less serious, and nothing the prosecutor had heard lessens the seriousness of the crime -- reinforced an impermissible interpretation of factor (k), and what the Court said in addressing this contention is also instructive here:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as

> matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the court. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

Id. at 384-85 (internal citations omitted).

In this case, there is no question that the prosecutor misstated what factor (k) refers to. He argued that"any other circumstance which extenuates or lessens the gravity of the crime . . . doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity." This was incorrect, as the California Supreme Court held.[7]

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[7]The dissent relies on what it states that the California Attorney General's office "conceded" in argument to the United States Supreme Court in Boyde -- that "the prosecutor in Payton had `misled the jurors.' " Dis. op. at 9747. Whether or not this would matter if it happened (the question here is prejudicial error, not error), the state in fact made no such concession. What happened was that during a discussion about whether reasonable people could misinterpret the language of the factor (k) instruction that the Court ultimately approved, a justice remarked that "[a]t least one prosecutor, you would agree, has read it the way your opponent says the jury might read it." The following colloquy then occurred:

The question is whether this incorrect argument so infected the penalty phase with unfairness that the resulting sentence denied Payton due process. We do not think so. We examine Payton's claim mindful of the presumption that jurors follow a court's instruction. See Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."). As Boyde counsels, prosecutors' comments lack the force of jury instructions, and we cannot say that reasonable jurors in Payton's case were likely to conclude from the prosecutor's statements, in context of the arguments as a whole together with the court's instructions, that they could not consider Payton's mitigating evidence at all.

The prosecutor began his closing argument by reading the entire instruction on the eleven mitigating factors that the jury was to be given, then stating: "I'm going to go over them, some of these are applicable and some of them are not, depending on

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> MR. MILLAR: I would say that he misled the jurors in those case [sic], as far as what the face of that –
>
> QUESTION: But don't you suppose he did so because that is the way he read the instruction?
>
> MR. MILLAR: Well, I think we are speculating as far as what particular prosecutors did in particular –

Trans. Oral Argument, Nov. 28, 1989, Boyde, 1989 U.S. TRANS LEXIS 124, *26, *28-*29. It is impossible to tell from the transcript whether the exchange even referred to Payton. In sum, as the California Supreme Court said, "[w]e have examined the transcript of the oral argument in Boyde, and find nothing in it relevant to the proper resolution of this case." Payton, 3 Cal.4th at 1073, 13 Cal. Rptr. 2d at 541.

your findings." R.T. 2117. When he got to factor (k) and incorrectly stated that "[i]t doesn't refer to anything after the fact or later," Merwin moved for a mistrial. The court admonished the jury that comments of counsel are not evidence and that "this is argument. And it's to be placed in its proper perspective." The prosecutor went back to factor (k), arguing that the problem with Payton's new Christianity is that "that evidence is well after the act of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed. . . . What I am getting at, you have not heard during the past few days any legal evidence mitigation [sic]. What you've heard is just some jailhouse evidence to win your sympathy, and that's all." Then he reviewed the aggravating evidence, and concluded by turning to religion. He prefaced this discussion with the remark that he did not "really want to spend too much time on it because I don't think it's really applicable and I don't think it comes under any of the eleven factors." He argued that religion can't whitewash the past, that the jury should not be impressed with Payton's writings about what he felt while he was a fugitive in Florida, that Payton got religion after he was in custody, and that he did not give mercy to Montgomery. Summing up how the factors should line up, the prosecutor said: "You haven't heard anything to mitigate what he's done. If you wanted to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery, and I really doubt if Mr. Merwin would dispute that breakdown of the facts."

Merwin's argument noted that he disagreed with the prosecutor about the applicability of factor (k). He told the jury that "you first have to look at the factor that's being discussed and decide in your own mind whether that factor is applicable to the facts of our case." Like the prosecutor, he argued whether the various factors were applicable or not. When he got to factor (k), Merwin indicated that this was one where"we disagree rather strenuously." He stated: "Mr. Jacobs tells you that's not

applicable. If that's not applicable and that therefore all the evidence we presented is not applicable, why didn't we hear any objections to its relevance?" The prosecutor objected and the court said it was not going to repeat the admonition. Merwin continued:

> The whole purpose for the second phase of trial is to decide the proper punishment to be imposed. Everything that was presented by the defense relates directly to that.
>
> This section "k" may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phrase. It was designed to include, not exclude, that kind of evidence.
>
> Any jury that wanted -- that was in the position of trying to determine the fairest possible sentences, select them between death or life without possibility of parole, would not only want that kind of evidence but would need it to make an intelligent decision.
>
> I submit the facts of this case, and this would not always be true, that that is the most critical of the factors, not only is it not irrelevant, it's the most critical of all the factors and I want to go through some of the reasons for that with you now.

R.T. at 2150-51.

The court's final instructions directed the jury:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence

> which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> (k), Any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime.

In context, the prosecutor's incorrect statement was ameliorated by the court's admonishment, his discussion of Payton's mitigating evidence, his concession that at least some points would go to it, defense counsel's broad reading of factor (k), and the court's instructions that the jury "shall" consider "all" the evidence -- which necessarily included Payton's evidence of religious conversion.

Set against this, we are not persuaded that the court left it to the prosecutor to instruct on the law, or that the court and the prosecutor between them left it to the jury to determine the law. The entire mitigating evidence instruction is the same as the entire mitigating evidence instruction that the Supreme Court considered in Boyde. See 494 U.S. at 373, n.1 (quoting instruction in full). We cannot believe that when the trial court instructed the jury to consider all the evidence "except as you may be hereafter instructed," the phrase "except as you may be hereafter instructed" matters, constitutionally or otherwise, because nothing that was thereafter instructed told the jury that any evidence received during the trial, guilt phase or penalty phase, was excluded from their consideration. All of it was on the table. The defense evidence at the penalty phase focused entirely on evidence of Payton's religious conversion.

Both the prosecutor and defense counsel argued its value. Both treated the applicability of the mitigating factors, including factor (k), as depending upon what the jury found convincing in the evidence. Each expressed a different view. Further, the court's initial instructions, which were again given to the jury at the penalty phase, made clear that it is the court that instructs on the law.[8] The prosecutor never suggested otherwise.

In these circumstances, we think it unlikely that reasonable jurors would believe the prosecutor's incorrect statement "transformed all of this `favorable testimony into a virtual charade.' " Boyde, 494 U.S. at 383 (quoting California v. Brown, 479 U.S. 538, 542 (1987)). To do so they would have had to ignore the whole of the penalty phase, the court's instruction to put the prosecutor's argument in perspective and to consider all the evidence, and the attention given by both parties in argument to Payton's religious conversion. We presume that jurors follow the court's instructions,[9] and we cannot believe that they would have refused to consider Payton's penalty phase evidence simply because the prosecutor stated that, to him, factor (k) didn't mean something that happened after the fact.

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[8]The trial court instructed:

> Your . . . duty is to apply the rules of law that I state to you to the facts as you determine them and in this way to arrive at your verdict.
>
> It is my duty in these instructions to explain to you the rules of law that apply to this case. You must accept and follow the rules of law as I state them to you.

[9]See Weeks, 528 U.S. at 234.

This being so, we cannot conclude that the penalty phase of Payton's trial was infected with such unfairness as to render his sentence a denial of due process. See Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000); Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir. 1995). We therefore vacate the writ.

Payton's Cross-appeal

Payton's cross-appeal raises three overarching issues: whether his counsel rendered ineffective representation, whether the prosecutor's conduct denied Payton due process, and whether the district court erred in refusing to grant him additional funds to develop his mental defense, to investigate the background of both informants, and to pursue the prosecutor's failure to disclose their background to the defense. None requires the petition to be granted.

III

Payton argues that Merwin conducted an incompetent investigation into Payton's mental state in the guilt phase by failing to investigate his conduct on the night of the murder; failing to investigate his personal and family background sufficient to develop information for a competent evaluation; and failing to obtain a forensic evaluation. He also claims that Merwin was ineffective in failing to seek appropriate discovery from the prosecution; failing to investigate the background of the informants; focusing the jury panel on a psychiatric defense that was never presented; and failing adequately to consult with Payton. Individually and cumulatively, he submits, these errors invalidate his conviction.

The standards are well established. To prevail under Strickland v. Washington, 466 U.S. 668 (1984), Payton must show that his "counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. at 687. Counsel's

performance is measured "as of the time of counsel's conduct," id. at 690, and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.' "[10] Id. at 689 (quoting Michel v. Louisiana , 350 U.S. 91, 101 (1955)). Because Payton must prove both deficient performance and prejudice, we "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Id. at 697.

Payton must "affirmatively prove prejudice." Id. at 693. This requires showing more than the possibility that he was prejudiced by counsel's errors; rather, he must demonstrate that the errors actually prejudiced him. See id. Under Strickland, actual prejudice occurs where "there is a reasonable probability

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[10]As the Supreme Court emphasized in Strickland:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

466 U.S. at 690-91.

that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Whether an error actually prejudiced a defendant is weighed against the "totality of evidence before the judge or jury." Id. at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. at 696.

Finally, Payton's "ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case." Bragg v. Galaza , 242 F.3d 1082, 1088 (9th Cir. 2001) (quoting Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986)). Here, the government's case was overwhelming. Payton was linked to the crimes by physical evidence and eye-witness testimony, and confessed to an urge to kill. We consider each of his claims in that light.

A

The record demonstrates that Merwin conducted a reasonable investigation of Payton's behavior on the night of the attack. A defense investigator interviewed two potential witnesses, both of whom described Payton's drinking and two incidents of attempted sexual assault. Given these reports, reasonable counsel could presume that exculpatory evidence would not develop from further investigation. A defense counsel is not ineffective where he to fails to interview a witness when the witness's "account is otherwise fairly known . . . ." Bragg, 242 F.3d at 1088 (quoting Eggleston, 798 F.2d at 376); see also Strickland, 466 U.S. at 691 ("[W]hen the facts that support a certain potential line of defense are generally known to counsel . . . the need for further investigation may be considerably diminished or eliminated altogether."). More to the point, Payton cannot identify any exculpatory evidence that was never

discovered. In the absence of such evidence, there can be no prejudice. See Bragg, 242 F.3d at 1088-89 (petitioner failed to identify what information further investigation would have revealed and how it would have been relevant given the strength of the government's case).

Payton did submit new evidence indicating that his biological father was abusive during the first five years of his life, that he was ignored by his mother and step-father, that he may have had a learning disability as a child, that he suffered negative psychological consequences as a result of his service in Vietnam, and that he has a history of substance abuse. However, Merwin, the experts, and the investigator interviewed Payton and his family and nothing they were told at the time would have tipped them to pursue any of these matters further. Their investigation revealed that Payton was raised in a happy home, that he was intelligent (possibly even in the superior range), and that he had used or abused drugs but was not on or affected by drugs at the time of the attacks. They also reviewed Payton's service records, which showed that he served in a non-combat capacity in Vietnam for twenty-two days before being discharged on account of heroin use. As found at the state evidentiary hearing, Payton admitted that he had not in fact had any combat experiences and any evidence of post traumatic stress disorder would have been almost totally unbelievable. See People v. Payton, 3 Cal.4th at 1074-79, 13 Cal. Rptr. 2d at 542-45. Thus, although it is difficult to fault counsel's investigation,[11] we need not resolve the issue because it is clear

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[11]Cf. Seidel v. Merkle, 146 F.3d 750, 755-56 (9th Cir. 1998) (as amended) (despite signs of mental illness trial counsel failed to conduct any investigation at all into defendant's psychiatric history); see Hendricks v. Calderon, 70 F.3d 1032, 1037-39 (9th Cir. 1995) (counsel not ineffective for relying on psychiatric evaluations rather than independently investigating defendant's personal and family history).

that Payton has not shown that the negative evaluations of any of his mental health experts would be different because of the family history that he now proffers. He has not, therefore, proved prejudice.

Payton's claim with respect to forensic evaluation centers on Merwin's delay in obtaining psychiatric evaluations and how he handled the reports, particularly his delivery of Dr. Klatte's evaluation to Dr. Kaufman. So far as delay is concerned, nothing suggests that Dr. Klatte's opinion would have been different had it been rendered earlier. Dr. Klatte specifically stated at the state habeas evidentiary hearing that he had enough information to form his opinion. Further, by then, Payton had already been evaluated by Dr. Sheffner with similar negative results. Likewise, there is no evidence that Dr. Kaufman's evaluation would have been different had it been handled differently. Payton claims that counsel should have had Dr. Kaufman interview Payton, although Dr. Kaufman himself did not say that an interview was necessary, and that counsel erred under California law by giving him Dr. Klatte's report.[12] But even putting Dr. Kaufman's opinion aside, two mental health experts came to nearly identical conclusions. There is no showing of any different opinion. For this reason it is unnecessary to decide whether counsel erred under California law in giving Dr. Kaufman Dr. Klatte's report, as Payton contends. Payton was not prejudiced regardless.

B

Payton asserts that he was prejudiced because Merwin failed to request or obtain a court order for discovery compliance. Had

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[12]See People v. Coddington, 23 Cal.4th 529, 603-06, 97 Cal. Rptr. 2d 528, 593-96 (2000) (disclosure of non-testifying experts who examined defendant protected by work product privilege).

he done so, Payton maintains that he would have obtained information critical to the defense for both guilt and penalty phases on Alejandra Garcia, one of the informants who testified against him. He claims that the additional information would have shown prior instances when Garcia provided information to the government in exchange for guilty pleas, and facts establishing that Garcia targeted Payton as a source of information to develop for the benefit of law enforcement. Assuming counsel should have followed-up on the prosecution's voluntary disclosures, we nevertheless see no reasonable probability that the results would have been different.

None of the evidence that Payton adduced suggests that Garcia was acting as a government agent or otherwise elicited the confession in violation of Massiah v. United States, 377 U.S. 201 (1964). Payton conceded as much at oral argument.

Nor would further impeachment have any reasonable probability of producing a different outcome. Garcia in fact had three more convictions than the seven Merwin knew about, but they would simply have been cumulative.[13] Garcia admitted at trial that he had been convicted of felony forgery in 1959, burglary in 1971, grand theft in 1975, and a burglary the previous September. He also testified that he had recently "cleared paper" on over 300 burglaries in exchange for probation on his most recent burglary charge. Garcia stated that he had no charges pending against him, and that he was not offered, and was not receiving, anything for his testimony. Nothing suggests otherwise.

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[13]See United States v. Marashi, 913 F.2d 724, 732 (9th Cir. 1990) (holding no Brady error occurs "when the evidence would not have affected the jury's assessment of the witness' credibility and when the witness was subjected to vigorous cross-examination.") (quoting United States v. Endicott, 869 F.2d 452, 456 (9th Cir. 1989)).

Payton's discovery that Garcia had testified as an informant in 1976 does not undermine our confidence in the result, because there is no evidence that he sought or received any consideration for his testimony in that case except for an undertaking to try to arrange out-of-state incarceration for his safety. Similarly, the fact that Garcia was permitted to serve time for his latest burglary conviction at the Anaheim City Jail instead of state prison after he "cleared paper" does not show that he had charges pending for which he expected any consideration. Payton's claim that Garcia committed perjury when he testified that his probation was revoked for failing to report, whereas it was actually revoked for a positive drug test, lacks merit; it is unclear whether his probation was revoked for one, the other, or both. Consequently, we see no prejudice.

C

Payton argues that Merwin's voir dire inquiries about prospective jurors' attitude toward presentation of psychiatric evidence, and disclosure of the identity of potential experts who might be called as witnesses, was prejudicial as it led the jury to expect that defense psychiatric evidence would be forthcoming. Merwin explained at his deposition that he believed a juror's views on psychiatric evidence gave insight into their beliefs on life and reasonable doubt, as well as their ability to weigh aggravating and mitigating factors. This was a tactical decision that we decline to second guess. In any event, Payton has shown no actual prejudice because he only speculates as to the effect this line of questioning had on the jury.[14]

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[14]See Wade v. Calderon, 29 F.3d 1312, 1318 (9th Cir. 1994) (petitioner suffered no prejudice on account of counsel's failure to examine jurors during voir dire concerning diminished capacity and insanity defenses where defense later relied upon those theories).

D

Payton claims that during the year between his appointment and commencement of trial, Merwin only conferred with him for 8.1 hours, but he points to nothing that would have happened differently had Merwin and he spent more time together. Absent this, there is no reasonable probability that the results of the proceeding would have been different.

E

Payton contends that the prosecutor committed misconduct during the guilt phase by failing to disclose Brady[15] material which could have further impeached Garcia and made it likely that the superior court would have rendered a more favorable ruling on the admissibility of Garcia's testimony. To prove a Brady violation, Payton must show that: "(1) the evidence was exculpatory or impeaching; (2) it should have been, but was not produced; and (3) the suppressed evidence was material to his guilt or punishment." Paradis v. Arave, 130 F.3d 385, 392 (9th Cir. 1997). Impeachment evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley , 514 U.S. 419, 433 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). For reasons we have already explained, we do not believe that the additional, undisclosed information was material, as it would not have undermined Garcia's credibility any more than his credibility was already undermined by testimony about his prior convictions and "clearing paper" on approximately 300 burglaries in exchange for probation on his most recent charge. Neither can we say that it would have changed the result of the state court hearing; there is no suggestion that Garcia had any

[15]Brady v. Maryland, 373 U.S. 83 (1963).

promise of leniency or other consideration for testifying in Payton's case.

F

Payton's claim of prejudicial, cumulative error turns on the absence of adequate preparation of a mental defense. However, Merwin investigated Payton's conduct during the night of the crime, family background, and mental health, and Payton has not demonstrated that any mental health expert would diagnosis him differently from Dr. Sheffner, Dr. Klatte, and Dr. Kaufman. Consequently, no error occurred on these claims. Nor do we see any error during voir dire. Payton's claim of ineffective assistance of counsel for Merwin's failure to investigate Garcia and his claim of prosecutorial misconduct for the prosecutor's failure to disclose evidence about Garcia are opposite sides of the same coin. Thus, cumulatively, these claims cause no more prejudice than they do independently.

IV

Payton's penalty phase arguments all focus on claims of ineffective assistance of counsel. The Strickland analysis is the same with respect to the penalty phase as it is with the guilt phase. "When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695.

A

Payton contends that Merwin failed to examine prospective jurors properly about their attitudes toward the death penalty,

reflecting his (improper) belief that a juror was to engage in a mechanical tallying of aggravating and mitigating factors; failed to object to the prosecutor's advice that if the aggravating factors outweigh the mitigation, the jury should vote for the death penalty; and improperly failed to articulate that the determination must be resolved by each individual juror. Regardless, the trial court correctly instructed the jury at the penalty phase on its duties in arriving at an appropriate punishment, see Boyde, 494 U.S. at 377, and we presume that the jury followed the instructions. See Weeks, 528 U.S. at 234.

B

Payton argues that his counsel was ineffective for failing to investigate the background of jailhouse informant, Daniel Escalera, who testified during the penalty phase, to determine his credibility or history as a government agent. Payton first contends that had Merwin read the transcript of Escalera's statements to investigators, he would have known that he was a government agent. The tape does not show this, although arguably it should have spurred further inquiry. Postconviction, Payton uncovered evidence of Escalera's numerous arrests, work for the Drug Enforcement Agency, and testimony as an informant. Still, nothing shows that Escalera was planted as a government agent to elicit incriminating information from Payton, thereby violating his Massiah rights. As with Garcia, Payton acknowledged at argument that there was no reasonable likelihood that Escalera would not have been allowed to testify even if his post-conviction discoveries had been known at the time.[16]

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[16]See People v. Pensinger, 52 Cal.3d 1210, 1249-50, 278 Cal. Rptr. 640, 658-59 (1991) (holding that an informant, who had a prior history of being an informant, was not a government agent where the informant initiated discussions with the police; the police did not ask for the informant to take any action or to

Second, he asserts that a reasonable investigation would have discovered substantial evidence that could have further impeached Escalera at trial. However, Escalera's prior convictions came out on both direct-examination and cross-examination, as did his recent guilty plea to a felony robbery charge in exchange for a potential prison sentence of one to seven years; Escalera also admitted that he hoped for leniency for testifying against Payton. Thus, the jury was aware that Escalera had a motive for giving testimony. In that context, further information about his background as a confidential informant in unrelated drug cases, and leniency received in return for testimony in those cases, would unlikely have swayed the jury.

C

Payton contends that Merwin rendered constitutionally ineffective assistance in failing to investigate timely and adequately, and to present evidence about, his personal, family, and mental background during the penalty phase of the trial. "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." Smith v. Stewart, 241 F.3d 1191, 1198 (9th Cir. 2001) (quoting Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir.), cert. denied, 527 U.S. 1049 (1999)). "Failure to present mitigating evidence at the penalty phase of a capital case constitutes ineffective assistance of counsel." Bean v. Calderon, 163 F.3d 1073, 1079 (9th Cir. 1998). Here, of course, mitigating evidence was presented and, as we have discussed, Merwin did investigate Payton's personal and family background. Payton points to

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"keep his ears open"; the police did not offer leniency; the police did not know that the witness had previously been an informant; the police told the informant he was not their agent; and the prosecutor testified on the informant's behalf at his trial).

post-conviction declarations by siblings which show that he may have suffered abuse from his biological father during his first five years, but the evidence is inconclusive at best. Two of the three are unsure whether Payton was abused, and the other provides no details. Even so, the record shows the first five years were followed by a normal and supportive environment.

Nor was counsel deficient for failing to present evidence of mental defect. Such evidence did not exist then, and does not exist now. Merwin consulted with mental health experts, but their opinions were aggravating rather than mitigating. Although Payton contends that the experts lacked the information or time to diagnose him properly, he has proffered no medical opinion to undermine our confidence in those evaluations. In short, there is no basis for finding prejudicial error.

Finally, the state's case of aggravation was overwhelming. The crimes were vicious and Payton had committed a similar attack in the past. Thus, even if Payton's speculative mitigation evidence were thrown into the balance, there is no reasonable probability that the outcome would have been different. See Bonin v. Calderon, 59 F.3d 815, 836 (9th Cir. 1995) ("[I]n cases . . . where the aggravating circumstances are overwhelming, it is particularly difficult to show prejudice at sentencing due to the alleged failure to present mitigation evidence.").

D

Payton maintains that Merwin failed to develop and present evidence of post-traumatic stress disorder (PTSD) resulting from his service in the Vietnam War, but offers nothing substantial in support. In any event, Payton cannot demonstrate that Merwin was deficient for failing to investigate a defense that did not exist until after Payton lied about his combat experience. Further, the record indicates that Merwin did

investigate Payton's service in Vietnam (and found no "red flags" which warranted further investigation), and that he disclosed Payton's service record to the psychiatrists who examined him, none of whom diagnosed him with PTSD. See Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999) (holding that counsel cannot be faulted for failing to pursue a mental state defense when such a defense seems unlikely); Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998) (as amended) (holding that counsel had no obligation to seek out specific PTSD experts rather than the experts counsel actually retained).

E

Payton contends that Merwin should have objected when the prosecutor argued to the jury about his mitigation evidence, "What you've heard is just some jailhouse evidence to win your sympathy, and that's all." He relies on California v. Brown, 479 U.S. 538, 542-43 (1987), and Lockett v. Ohio, 438 U.S. 586, 604 (1978), but neither is apposite because Merwin's failure to object did not tacitly concede that the jury could not consider sympathy.

F

Finally, Payton argues that his sentence must be overturned because of cumulative error. Even when we consider all of Payton's claims cumulatively, we do not see errors that "had substantial and injurious effect or influence in determining the jury's verdict" because the jury would have reached the same conclusion anyway. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

V

Payton asks us to reverse the district court's determination that he was not entitled to additional funds to complete his

psychiatric evaluations in order to demonstrate prejudice resulting from trial counsel's failure adequately to pursue a mental defense. We review the denial of investigative funds for an abuse of discretion. See Bonin, 59 F.3d at 837. We have thoroughly examined the record and documents that Payton has filed under seal, and conclude that the district court did not err. Payton was entitled to "reasonably necessary," not unlimited, funds. See id. The record and sealed documents indicate that Payton has had ample opportunity and funding to complete necessary mental health evaluations. He received three mental health examinations in preparation for trial, and substantial investigation into his claimed PTSD which only arose after he lied about his Vietnam War service record. Payton's inability to produce evidence supporting his petition is not indicative of his lack of funding; rather, it demonstrates the lack of merit to his claims.

Conclusion

We disagree with the district court's conclusion that the prosecutor's closing argument rendered Payton's penalty trial fundamentally unfair. We agree that Payton has failed to demonstrate any basis for habeas relief on his guilt phase claims or remaining penalty phase claims. Accordingly, we reverse the judgment entered on Claim IVB, item 3 of the Petition for Writ of Habeas Corpus and order the writ vacated. Otherwise, we affirm.

AFFIRMED IN PART; REVERSED, VACATED AND REMANDED IN PART.

HAWKINS, Circuit Judge, concurring in part and dissenting in part:

Because I agree with the district court that Payton was deprived of his due process rights in the penalty phase of his trial, I respectfully dissent from Section II of the opinion.[1]

This is a case of compound error involving a serious and repeated misrepresentation of law by the prosecutor. The initial error occurred when the prosecutor was permitted, in effect, to instruct the jury that it could not legally consider Payton's mitigating evidence -- evidence that the California appellate courts acknowledge was completely admissible. Bad enough that this should happen, but in a nearly complete abdication of its responsibility to properly explain the law to the jury, the state trial court not only failed to correct the misinformation, it permitted the prosecutor to argue his own interpretation of a sentencing factor as if it were the law. Because the prosecutor's "instructions" told the jury it must ignore the only mitigation evidence that Payton offered, the decision whether to consider it made the difference, quite literally, between life and death. All this was done without ever correctly instructing the jurors that the evidence was fully admissible and that they were required to consider it. The result of this deadly combination of prosecutorial misleading and judicial abdication "fundamentally affected the fairness" of the penalty phase of Payton's murder trial and violated his due process rights. Darden v. Wainwright, 477 U.S. 168, 181 (1986). The district court was quite right to determine that the proper remedy was to order the state to conduct a new penalty phase hearing for Payton or commute his death sentence to life without possibility of parole.

In its so-called "unadorned version," factor (k) instructed the members of the jury that they could consider: "Any other circumstance which extenuates the gravity of the crime even

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[1] I concur in the result with respect to the guilt phase, the remaining penalty phase issues and the denial of additional investigative funds.

though it is not a legal excuse for the crime."[2] Although in a chambers conference the trial court agreed with Payton's counsel that factor (k) was a "wide open," "catch-all" provision, Payton's request for an instruction to make clear to the jury that his mitigating evidence should be considered was refused. Were this the end of the story, I might agree with the majority that Payton's case is quite similar to Boyde v. California, 494 U.S. 370 (1990), which addressed the constitutionality of former CALJIC 8.84.1.

Unlike the prosecutor in Boyde, however, who" `never suggested that the [defendant's] background and character evidence could not be considered,' " id. at 384 (quoting People v. Boyde, 758 P.2d 25, 47 (1988)), the prosecutor in Payton's case, armed with the authorization of the trial court, told the jury it could not legally consider Payton's only mitigation evidence, the evidence of his religious conversion. First, the prosecutor argued that factor (k) referred only to:

> some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. It doesn't refer to anything after the fact or later. That's particularly important here because the only

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[2]In People v. Easley, 671 P.2d 813 (Cal. 1983), the California Supreme Court recognized the potential for confusion over the meaning of factor (k). Id. at 826 & n.10. The instruction was later changed to read "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." Boyde v. California, 494 U.S. 370, 375 n.2 (1990) (quoting 1 California Jury Instructions, Criminal 8.85(k) (5th ed. 1988)). Payton's trial occurred prior to the decision in Easley.

> defense evidence you have heard has been about this new born Christianity. (Emphasis added).

Although Payton's counsel objected to this argument as inconsistent with the agreement reached in chambers regarding factor (k), the judge decided to let the attorneys "make that argument either way." The prosecutor then resumed his attack on the legality of Payton's mitigation evidence:

> The only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody. The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed. . . . What I am getting at, you have not heard during the past few days any legal evidence [of] mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial. (Emphasis added).

The prosecutor continued this theme throughout the closing, noting later on that "You've heard no evidence of any mitigating factors" and then, even later, addressing Payton's evidence but reiterating that "I don't think it's really applicable and I don't think it comes under any of the eleven factors."

The majority concedes that the prosecutor's argument was improper but argues that it did not so infect the penalty phase with unfairness as to deprive Payton of due process. First, the majority argues that the impact of the prosecutor's initial statement was diluted by a "curative" instruction from the judge. Once the prosecutor began suggesting that Payton's mitigation evidence was inapplicable, Payton's attorney immediately

objected. The judge overruled this objection, however, and indicated he was going to let each side"argue it." He then simply commented to the jury that "the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument." With that, the judge permitted the prosecutor to continue to admonish the jurors that the California sentencing factors simply did not let them consider any mitigating evidence pertaining to events after the crime. It is difficult to determine how the court's limited intervention did anything to correct the error; if anything, it expressly permitted the error to be repeated.

Next, the majority argues that the prosecution discussed the defense's evidence in mitigation and "conceded" it had at least some merit. Again, I disagree. The prosecution put very little emphasis on the defendant's evidence and then did so without ever conceding it could or should be considered.[3] His limited discussion of Payton's evidence also pales in comparison to the prosecutor's repeated arguments to the jury that it could not consider the only evidence in mitigation offered by Payton.

The majority also contends the prosecutor implicitly conceded the validity of Payton's defense when he said: "If you wanted to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery." The majority reads

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[3]Specifically, the few comments the prosecutor did make were prefaced as follows:

> I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because I don't think it's really applicable and I don't think it comes under any of the eleven factors . . ..

this as conceding Payton's religious conversion evidence was worth at least 100 points. The more logical interpretation is that the prosecutor was telling the jury that 900 points would go to the rape/murder, with the other 100 points going to other aggravating factors, such as prior felonies. Whatever the interpretation, it is highly unlikely a jury would (1) view such an obtuse "concession" as undermining the prosecutor's explicit, repeated argument that the evidence could not be considered, or (2) disregard the prosecutor's caveat that even though he was discussing the religion evidence, he still did not believe it could be considered.

The majority also asserts the effect of the prosecutor's argument was blunted because the defense was permitted to argue for its own interpretation of factor (k). Although defense counsel told the jury it could consider Payton's evidence, he could point to no language in the statute or instruction that supported this claim. He instead was left with arguing that factor (k) was "awkwardly worded," but that it did not preclude consideration of the post-crime religious conversion. This is in stark contrast to the repeated argument of the prosecution, referring to the language in factor (k) -- "extenuates or lessens the gravity of the crime" -- to bolster the argument that the language of factor (k) refers only to some fact in operation at the time of the offense. Cf. Penry v. Johnson, 121 S. Ct. 1910, _____ (2001) (rejecting argument that defense counsel had sufficiently clarified application of jury instruction because prosecutor had "effectively neutralized defense counsel's argument" and "[a]t best, the jury received mixed signals").

The majority also relies on the "consider all the evidence" instruction given to the jury. More precisely, the jury was instructed to consider "all the evidence . . . except as you may be hereafter instructed." (emphasis added). The very next instruction the jurors heard was CALJIC 8.84.1 regarding aggravating and mitigating factors, including factor (k), which

the prosecution had told them precluded consideration of Payton's evidence. The generic "consider all the evidence" instruction did nothing to undo the damage.

The majority relies heavily on Boyde, in which the Supreme Court determined that the context of the proceedings in that case would have led reasonable jurors to the proper interpretation of factor (k). 494 U.S. at 383. However, Boyde is different in several significant respects. First, Boyde's mitigating evidence involved his background and character, pre-crime evidence which more readily fits within factor (k). Payton's only evidence was post-crime, a distinction the prosecutor brought home again and again. Second, Boyde presented "four days of testimony consuming over 400 pages of trial transcript," which led the Supreme Court to conclude a reasonable jury would not disregard such "volumes " of mitigating evidence without more specific direction. Id. at 384. The Supreme Court also noted, however, that "(p)resentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence." Id. In Payton's case, his mitigating evidence was much less voluminous -- it was presented in one day and took only seventy-three pages of transcript.

Finally, and most importantly, the prosecutor in Boyde never suggested that the defendant's mitigation evidence could not be considered. Id. at 385. The Supreme Court emphasized that the prosecutor's principal theme was not that Boyde's mitigation evidence could not be considered, but that it should be given minimal weight in light of the aggravating circumstances. Id. The exact opposite is the case here. In fact, in oral argument before the Supreme Court in Boyde, the California Attorney General discussed this very case and conceded that Payton's prosecutor had "misled the jurors." See Trans. Oral Argument, Nov. 28, 1989, Boyde, 1989 U.S. Trans. Lexis 124, *10-11,

*26-28;[4] see also Boyde, 494 U.S. at 386 n.6 (noting that "prosecutors in other cases may have pressed a construction of factor (k) that would cause the sentencing proceedings to violate the Eighth Amendment" but that did not mean the jury in Boyde arrived at the same conclusion).

This is not a case where the prosecutor made an offhand remark during the course of trial. The prosecutor's erroneous argument was far from subtle. It was explicit, deliberate, consistent and repeated. Certainly, arguments of counsel generally carry less weight than instructions from the court. Boyde, 494 U.S. at 384. But when the court expressly permits counsel to argue the legal meaning of an instruction, without ever instructing the jury which interpretation is correct, the arguments of counsel obviously take on significant importance. A lay jury is ill-equipped to determine which view of the law is correct. See Griffin v. United States, 502 U.S. 46, 59 (1991) (if "jurors have

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[4]Although the majority contends it is "impossible to tell from the transcript whether the exchange even referred to Payton," I believe it is quite clear that it did if one reads the entire transcript. Boyde's counsel referenced an amicus brief containing examples of prosecutors misreading section (k), and then asked the Court to consider, specifically, "the case of People versus Payton." 1989 U.S. Trans. Lexis 124, *10-11. During the State of California's argument, the Court asked counsel to address Boyde's argument concerning Payton. Id. at *26-27 ("Let me ask you about the prosecutor's argument in the other case that your opponent referred to . . . .") (emphasis added). It was in this context that the State said that the prosecutor in Payton had misled the jurors. Id. at *27-28. Moreover, in oral argument before this panel, the State admitted that the exchange occurred and involved Payton, but argued it was improper for the attorney to have made such a statement to the Court because the attorney was not sufficiently familiar with the record in Payton to have reached such a conclusion.

been left the option of relying upon a legally inadequate theory, there is no reason to think their own intelligence and expertise will save them from that error").

"The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered" by a defendant. Boyde, 494 U.S. at 377-78. The prosecutor's argument in this case flies directly in the face of this constitutional requirement. The context of Payton's penalty phase as a whole did little, if anything, to mitigate the prosecutor's error. The district court correctly and properly determined that the prosecutor's argument so infected the penalty phase with unfairness that Payton was denied due process. Darden, 477 U.S. at 181.

Was the error harmless under Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)? Under Brecht, an error is not harmless if it "had a substantial or injurious effect in determining the jury's verdict." Id. Quite frankly, if this error was harmless, it is difficult to imagine a sentencing phase error that would not be. The prosecutor told the jury it could not consider the only evidence of mitigation that Payton put forward. Without this evidence, the jury had no alternative but to reach a death verdict.[5]

Like many of the capital cases we review, Payton's crimes were certainly heinous. But that does not relieve us of the responsibility to ensure that the jury was properly advised and able to consider all properly admissible evidence. As we have previously explained:

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[5]The jury was instructed "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." (emphasis added).

> The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability. Presumably the imposition of a death sentence is entrusted to a jury because it is a uniquely moral decision . . . .

Hendricks v. Calderon, 70 F.3d 1032, 1044 (9th Cir. 1995).

This is not a case where effective but fair argument convinced a jury that the evidence of aggravation outweighed the evidence in mitigation. The prosecutor here was permitted to erroneously tell the jury what it could and could not consider. The trial court's flippant comment to allow the parties to "argue it" abdicated its responsibility to tell the jurors that Payton's evidence in mitigation was fully admissible and that they were required to consider it. Under these circumstances, it is difficult to imagine how the prosecutor's arguments could not have had a substantial and injurious effect on the jury's verdict.

It is very difficult to have confidence in the outcome of a life and death decision made in these circumstances. The verdict might have been reached through an appropriate weighing of aggravating versus mitigating factors, but it seems much more likely to have been reached because the jury erroneously believed there were no mitigating factors it could legally consider. For the reasons stated, I would affirm the district court's decision to grant the writ as to the penalty phase of Payton's trial.

APPENDIX E

APPENDIX E

[Filed December 17, 1999]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM CHARLES PAYTON, Petitioner, v. ARTHUR CALDERON, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 94-4779-R FINAL ORDER **DEATH PENALTY**

I. Introduction

Petitioner William Charles Payton is a prisoner on California's death row. He invoked the jurisdiction of the Court by requesting, pursuant to 21 U.S.C. § 848(q), the appointment of counsel to assist him in preparing and litigating a petition for writ of habeas corpus. Currently before the Court is the Amended Petition for Writ of Habeas Corpus filed on January 30, 1998.

On February 10, 1999, respondent filed a motion for summary judgment on the majority of the claims in the petition. On June 1, 1999, the Court granted the motion for summary judgment as to Claims 3 (A) (1) - (7), (9) - (21); 4 (A) (1) - (4),

(6) - (12); 3 (B) (1) - (3); and 4 (B) (1) and (2). The Court denied the motion as to Claim 4 (B) (3) and granted the petition as to the death sentence on that claim. The Court held that the prosecutor committed misconduct in urging the jury to disregard the mitigating evidence presented by Payton at the penalty phase.

The Court ordered the parties to file briefing on the remaining claims in the petition. Payton filed a brief on July 27, 1999. Respondent filed an opposition on August 24, 1999, and Payton filed a reply on September 8, 1999.

The Court has considered the state court record, the arguments of counsel, and all of the papers, pleadings, and records on file herein. The Court has thoroughly examined each issue raised by Payton and finds that none of the remaining claims warrant relief. Accordingly, the Court **DENIES IN PART AND GRANTS IN PART** the amended petition for writ of habeas corpus.

II. Background

A jury in California convicted Payton of murder while in the commission of a rape and two counts of attempted murder. After a penalty trial, the jury returned a verdict of death.

Payton filed a state habeas petition in conjunction with his automatic appeal. The California Supreme Court held an evidentiary hearing on the claim that Payton's trial counsel was ineffective for failing to present evidence that he suffered from Post-Traumatic Stress Disorder ["PTSD"]. On November 23, 1992, the California Supreme Court affirmed the conviction and sentence on direct appeal and denied the habeas petition. People v. Payton, 3 Cal.4th 1050, 13 Cal.Rptr. 2d 526 (1992) cert. denied, 114 S.Ct. 682 (1994).

Payton filed a federal habeas petition on May 6, 1996. Respondent filed a motion to dismiss for exhaustion. The motion was granted in part, Payton returned to state court to present the unexhausted claims, and the federal proceedings were held in abeyance. On December 11, 1997, the California Supreme Court denied the second state habeas petition. Payton filed an amended federal petition on January 30, 1998. Respondent filed an answer on May 15, and Payton filed a traverse on September 18, 1998.

III. Analysis

A. Claim 3(A)(8) - Failure To Investigate And Present Evidence Of Post-Traumatic Stress Disorder

Payton contends that his trial attorney, James Merwin, should have investigated and presented evidence that he suffered from PTSD at the time of the crimes. (Amended Petition for Writ of Habeas Corpus ["Pet."] at 36-41.)

To prevail on a claim of ineffective assistance of counsel, Payton must establish that counsel's performance was deficient and that the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish deficient performance, petitioner must show that counsel made errors so serious that his performance fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688. To establish prejudice, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Trial counsel has a duty to investigate a defendant's mental condition when there is evidence of impairment. Evans v.

Lewis, 855 F.2d 631, 637 (9th Cir. 1988) (counsel's failure to pursue the possibility of establishing [his client's] mental instability constituted deficient performance); see also Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995) (counsel has a duty "to seek psychiatric evaluation of a client where the grounds of a mental defense are apparent").

Merwin's investigation of a mental state defense at the guilt phase was reasonable. He consulted with three experts before deciding not to present a mental state defense. Payton, 3 Cal.4th at 1078. He provided the experts with a substantial amount of information relating to Payton and two of the experts actually interviewed him. All of the experts concluded that Payton did not have a viable mental state defense. In addition, each of the experts' reports contained damaging information about petitioner and his past actions. An attorney "is entitled to rely on the opinions of mental health experts in deciding whether to pursue an insanity or diminished capacity defense." Hendricks, 70 F.3d at 1038. Therefore, Merwin's decision not to pursue such a defense was a reasonably informed strategic decision and such decisions are "virtually unchallengeable." Strickland, 466 U.S. at 690. This subclaim is DENIED.

B. Claim 3(A)(22) - Violation Of Attorney-Client Privileges

Payton contends that Merwin violated the attorney-client privilege "by failing to make a confidential application for funds, under seal, in order to retain experts." (Pet. at 102.)

Prior to trial, Merwin sought the appointment of three mental health experts. (CT 80-82.) The orders appointing the experts were made part of the court file. Payton contends that Merwin violated the attorney-client privilege because he did not ask that the orders be made confidential pursuant to California Penal Code § 987.9.

Even if Merwin was found to have violated the attorney-client privilege, any error was harmless. In the habeas context, an error is harmless if it did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 638 (1993). Even if the prosecution had been forewarned that Merwin was contemplating a mental state defense, any breach of confidentiality was harmless because Merwin did not call any of the experts to testify. Any information that the prosecution could have obtained from reviewing the orders appointing the experts was useless. This subclaim is DENIED.

C. Claim 3(C) - Actual Innocence

Payton argues that he is innocent of the rape charge and argues that a DNA analysis of the physical evidence of the crime will prove his innocence.

In Herrera v. Collins, 506 U.S. 390, 400 (1993), the Supreme Court held that claims of actual innocence "based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the course of the underlying state criminal proceedings." The Court stated that executive clemency was the appropriate forum to present claims of actual innocence.

Payton has not established a constitutional violation in the underlying trial. A federal writ of habeas corpus is only proper where a prisoner is "in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2241. Therefore, Payton has not raised a cognizable claim on federal habeas.

In addition, persuasive evidence of rape was presented at trial. The victim was found in her bedroom wearing only a

nightgown which was open in front, saliva consistent with Payton's was found on her breast, semen found in her vagina was consistent with Payton's, he had blood on his penis and pubic area when he returned home, and he had fingernail marks on his back. A fellow prisoner also testified that Payton admitted raping the victim. Payton, 3 Cal. 4th at 1058.

Based on the foregoing, this claim is DENIED.

D. Claim 3(D)- Trial Court Errors

1. Claim 3(D)(1) and (7) - Denial of Right to be Present

In these claims, Payton argues that his constitutional rights were violated because several discussions were held between defense counsel, the prosecutor, and the trial court. These discussions were not recorded and Payton was not present during the discussions. (Pet. at 112-13; 117-19.)

Due process guarantees a defendant the right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunities to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934). "That right is not absolute, however, and even involuntary absence may be harmless error." Id. Therefore, the Court must determine whether Payton's absence had a "substantial and injurious effect or influence on the jury's verdict." Brecht, 507 U.S. at 638.

The Court has considered all of the proceedings identified by Payton in support of the claim that he was absent during crucial proceedings at trial. (Pet. at 118.) Payton has failed to establish that his absence at any of these discussions or proceedings had a "substantial and injurious effect or influence

effect or influence on the jury's verdict." Brecht, 507 U.S. at 638. Therefore, this subclaim is DENIED.

In a related claim (Claim 3(F)), Payton contends that appellate counsel failed to obtain a settled statement of the record and that the unreported conversations "could have been reconstructed at the time of the settling of the record, which is an obligation of both Petitioner's trial and appellate counsel." (Pet. Brief at 20.) However, petitioner has failed to establish either deficient performance or prejudice on the part of appellate counsel. Therefore, this claim is also DENIED.

2. Claims 3(D)(2), (3) and (4) - Failure to Properly Instruct the Jury on Jailhouse Informant Testimony

Payton contends that the trial court should have instructed the jury that his conviction could not be based on the uncorroborated testimony of a jailhouse informant and that the testimony of an informant should be viewed with suspicion. He also contends that the trial court should have instructed the jury on the factors involved in weighing the credibility of informant testimony. (Pet. at 114-16.)

The Court will not review this claim to determine if the jury instructions were proper under state law. A faulty jury instruction compels the issuance of a writ only where "' the ailing instruction so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughton, 414 U.S. 141, 147 (1973)).

Payton has failed to establish that the failure to give the instructions he contends should have given rendered his trial fundamentally unfair. There was sufficient evidence of rape for the jury to convict on that charge even if they had been told to

treat the informant's testimony with caution. In addition, the instructions that were given were adequate to guide the jury's assessment of the witnesses, including the informant. The jurors were instructed that they were the sole judges of the credibility of a witness (CT 223), that they could consider the existence of a bias, interest or other motive of a witness (CT 223), that they could consider the witness' prior conviction of a felony (CT 224, 227), and that "evidence of an oral admission of the defendant should be viewed with caution." (CT 234.) Therefore, the failure to provide additional instructions relating to informant testimony did not render the trial unfair. This claim is DENIED.

3. Claim 3(D) (5) - Trial Court Refused to Instruct on Diminished Capacity

In this claim, Payton argues that evidence was presented at trial that he had consumed alcohol on the night of the murder and that he exhibited signs of intoxication. (Pet. at 116.) However, according to Payton, the trial court erred in failing to give an instruction to the jury "which would have allowed them to apply the diminished capacity defense to [his] ability to premeditate, deliberate, harbor malice or form the specific intent to kill." (Pet. at 116.)

The Court found the California Supreme Court's analysis of this claim persuasive. Therefore, for the reasons stated by the California Supreme Court, this claim is DENIED. See Payton, 3 Cal. 4th ast 1060-62.

4. Claim 3(D)(6) - Reasonable Doubt Instruction

The reasonable doubt instruction given at trial is constitutional. Victor v. Nebraska, 511 U.S. 1, 22-23 (1994). This subclaim is DENIED.

E. Claim 3(E) - Prosecution Was Not Required To Prove All Elements Of The Crimes

Payton contends that this claim is foreclosed by Tyson v. Arizona, 481 U.S. 137 (1987), therefore, this claim is DENIED.

F. Claim 3(G) - Cumulative Error

None of the remaining alleged instances of error, either individually or in the aggregate, warrant habeas relief as to the guilt phase. Therefore, this claim is DENIED.

IV. Order

The penalty phase of Payton's trial was rendered fundamentally unfair by the prosecutor's improper argument regarding the jury's consideration of mitigating evidence. Therefore, a writ of habeas corpus shall issue VACATING and SETTING ASIDE the sentence of death in the case of People v. Payton, Case No. C-45040, unless, within 120 days of the entry of judgment herein, the State of California grants Payton a new penalty trial. If no retrial is held, Payton shall be sentenced to life in prison within the possibility of parole. Payton's convictions for murder, rape, and attempted murder remain valid.

IT IS SO ORDERED.

Dated: December 17, 1999.

/S/
Manuel L. Real
United States District Judge

APPENDIX F

APPENDIX F

[Filed November 23, 1992]

THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIAM CHARLES PAYTON, Defendant and Appellant.	No. S004437 Crim. Nos. 22511/25552 Orange County Superior Court Case No. C-45040
In Re WILLIAM CHARLES PAYTON, On Habeas Corpus.	S056446

COUNSEL:

Ellen Bailer Fondiler, Barry L. Levin, Stamp & Franklin and Joel Franklin for Defendant and Appellant and Petitioner. John K. Van de Kamp and Daniel E. Lungren, Attorneys General, Steve White and Richard B. Iglehart, Chief Assistant Attorneys General, Harley D. Mayfield, Assistant Attorney General, Frederick R. Millar, Jr., Jay M. Bloom, Holly D. Wilkens, John W. Carney and Esteban Hernandez, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by Arabian, J., with Lucas, C. J., Panelli, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Kennard, J., with Mosk, J., concurring.

OPINION BY: ARABIAN, J.

OPINION:

A jury convicted defendant of the 1980 first degree murder and rape of Pamela Montgomery, and the attempted murders of Patricia Pensinger and Patricia's son, Blaine Pensinger, all counts with the use of a butcher knife. (Pen. Code, §§ 187, 261, subd. (2), 664, 12022, subd. (a).)[1] The jury also found true the special circumstance allegation that the murder was committed while engaged in the commission or attempted commission of rape. (§ 190.2, subd. (a)(17)(iii).) After a penalty trial, the jury imposed the death penalty. The court denied defendant's automatic motion to modify the verdict. (§ 190.4, subd. (e).) This appeal is automatic. (§ 1239.)

Defendant filed a separate petition for a writ of habeas corpus alleging that a psychological defense based upon his "combat experiences" in Vietnam should have been presented at trial. We issued an order to show cause, and consolidated the matter with the appeal. A referee presided over an evidentiary hearing, and has issued his report.

We affirm the judgment and deny the petition.

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

I.

THE APPEAL

A. *The Facts*

1. *Guilt Phase*

Patricia Pensinger lived in Garden Grove with her three sons, including 10- year-old Blaine, and some boarders. One boarder, Pamela Montgomery, had moved into the house two days earlier. She was living there while her husband was on duty with the National Guard. Defendant and his wife had also been boarders at one time.

Around 4 a.m., May 26, 1980, Patricia, unable to sleep, was sitting in her kitchen working on a crossword puzzle. She heard the front door open, and then saw defendant enter the kitchen. Defendant said that he had car problems and wanted to talk to Patricia. She offered him a beer, and the two talked for a while. At one point, Pamela Montgomery entered the kitchen briefly to get a glass of water. Patricia introduced defendant to Pamela. After Pamela left the kitchen, defendant and Patricia continued talking. Defendant drank a total of three beers. Eventually, around 4:50 a.m., defendant asked Patricia if he could sleep on her couch in the living room. She agreed, and then went to sleep in her bedroom. Blaine was also sleeping in her bed.

Patricia was awakened some time later by "two blows on [her] back." She rolled over in time to see defendant jump onto the bed on top of her. He stabbed her repeatedly with a knife, primarily on the face and neck. Blaine woke up, and tried to take the knife away from defendant, but defendant also stabbed him. Patricia yelled, "Take me, leave my son." Defendant tried to stab her in the abdomen, then tried a second and a third time to stab her; the knife blade had bent, and would not penetrate.

Defendant got off the bed and left the room, yelling, "I'm leaving now."

Patricia told Blaine that she would try to keep defendant busy and that he should try to escape. She went into the kitchen, and saw defendant. The knife he had used was lying on the counter. Defendant reached for a second knife, and stabbed Patricia in the back. Blaine ran through the kitchen. As he ran past, defendant also stabbed him in the back. Defendant then resumed stabbing Patricia. Another son woke up by this time. Patricia yelled for her sons to awaken a male boarder. Defendant dropped the second knife on the kitchen floor, and fled the house through the front door.

Patricia suffered 40 stab wounds to her face, neck, back and chest. Blaine suffered 23 stab wounds to his face, neck and back. Both survived.

Not so fortunate was Pamela Montgomery. Her body, clad only in a nightgown that was open in the front, was found lying in a pool of blood on her bedroom floor. The body had 12 stab wounds, including 6 in a line from above the stomach to the pubic area. Three of the latter wounds alone would have been fatal. There were also some "defense wounds" sustained when the victim tried to defend herself. The victim had been dead about 15 to 30 minutes before the body was discovered.

Blood was found in various places in the bedroom and in a nearby bathroom. A pair of panties entwined around some shorts were found on the victim's bed. Saliva consistent with defendant's (and with that of a sizable portion of the general population) was found on the victim's breast. Semen that could have come from defendant was found in the victim's vaginal area. Defendant's fingerprint was found on a beer bottle in the kitchen.

After fleeing the Pensinger house, defendant went home, arriving around 6:15 a.m. Defendant's wife, Deborah Payton, waived the privilege not to testify against her husband, and testified that defendant's clothes, face, and hands were covered with blood. Some of the blood was still wet. His index finger was cut. When defendant removed his clothes, she observed that his genital area was covered with a "lot" of blood, as were his legs, chest and other parts of his body. His body contained scratches and what Deborah described as "fingernail digs," as if "somebody had applied quite a bit of pressure with fingernails."

Defendant and his wife left town that morning. Defendant was eventually arrested in Florida.

While in the Orange County jail, defendant told a fellow inmate about the crime. He said he raped and stabbed a woman, then stabbed a boy and the boy's mother. Defendant said he had "this urge to kill."

The defense presented no guilt phase evidence.

2. *Penalty Phase*

The prosecution presented evidence that in 1973, defendant stabbed a woman he was living with repeatedly in the chest and arm. A county jail inmate testified that defendant told him about the crimes committed in the Pensinger house. As a reason for the crimes, defendant said that he had a "severe problem with sex and women," and that he would "stab them and rape them." Defendant said "that all women on the street that he seen was a potential victim, regardless of age or looks."

The parties stipulated that defendant had suffered two prior felony convictions, both in 1976, one in Idaho for possession of over three ounces of marijuana, and one in Oregon for unlawful consensual sexual intercourse with a minor under the age of eighteen.

The defense presented evidence that defendant had become a religious person since his arrest and custody in jail. His mother testified that he was "totally immersed in the Lord." A minister who had known defendant for many years believed that his recent "commitment to the Lord" was sincere. A mission director testified about defendant's religious conversion and the good qualities he exhibited in jail. Defendant had established Bible study classes in jail, and had almost completed an autobiography that had an "excellent chance of being published in an international ... Christian publishing house." Many jail inmates "respect him and trust him and have a confidence in him." He hoped to develop a "ministry within the prison system" that would rehabilitate people. A deputy sheriff testified that defendant led Bible study sessions in jail, and had a positive influence on other inmates. Four fellow inmates testified about defendant's beneficial influence in jail.

B. *Discussion*

1. *Guilt Phase*

(a) *Instruction Regarding Informant's Testimony*

(1) Defendant contends the trial court erred by failing to instruct on its own motion that the testimony of a jailhouse informant should be viewed with suspicion and distrust, and that such testimony is inherently unreliable. We have repeatedly rejected similar contentions. (*People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1209-1210 [275 Cal.Rptr. 729, 800 P.2d 1159], and cases cited therein.) Defendant was given full opportunity to explore in front of the jury any motive to cooperate or other bias on the part of all the witnesses, including the jailhouse informant. The standard instructions on judging the credibility of witnesses adequately guided the jury's assessment of the jailmate's testimony. (*Ibid.*)[2]

Defendant also argues that the jury should not convict on the basis of uncorroborated testimony of informants. (Cf. § 1111 [accomplice testimony must be corroborated].) Neither we nor the Legislature has created such a requirement, but we need not resolve the question here, for the informant's testimony formed but a small part of the overall strong evidence against defendant. (See *People v. Alcala* (1984) 36 Cal. 3d 604, 624, fn. 10 [205 Cal.Rptr. 775, 685 P.2d 1126].)

(b) *Instructions On Diminished Capacity*

(2) Defendant contends the court's instructions on diminished capacity were insufficient.[3] As in *People v.*

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[2]Section 1127a, subdivision (b), enacted long after the trial in this case, now requires the court to give a specified cautionary instruction upon request. (See *People v. Gonzalez, supra,* 51 Cal.3d at p. 1210, fn. 5.) Even if that statute had been in effect at the time of trial, it would not help defendant's position, for here there was no request.

[3]After the instant crimes were committed, the Legislature abolished the defense of diminished capacity. (See *People v. Saille* (1991) 54 Cal.3d 1103 [2 Cal.Rptr.2d 364, 820 P.2d 588].) That legislation does not apply retroactively to this case. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1241 [278 Cal.Rptr. 640, 805 P.2d 899] [that the name is the same as the victim-witness in this case is coincidental].)

Frierson (1979) 25 Cal.3d 142, 155-157 [158 Cal.Rptr. 281, 599 P.2d 587], we disagree for three reasons: (1) there was insufficient evidence to warrant diminished capacity instructions at all, (2) the instructions the court did give were sufficient, and (3) any error was harmless given the actual verdicts.

(2) Defendant relied solely on the following testimony of Patricia Pensinger to support the diminished capacity claim. Defendant drank three beers while they talked in the kitchen. Defendant "had a funny way of shuffling his feet when he walks when he gets overly tired or when he was drinking." He exhibited that symptom that night. Also his speech was "slower, more precise than what his normal speaking voice was." However, he had no trouble walking, and his speech was otherwise fine. He knew what he was talking about, and he could respond. At the time of the stabbing, his reflexes, coordination and balance seemed normal.

"This evidence does not amount to substantial evidence that defendant lacked the capacity to form the requisite mental states, when we compare this case with others in which we have dismissed evidence of diminished capacity as insubstantial." (*People v. Pensinger*, *supra*, 52 Cal. 3d at p. 1241, 278; see also the cases cited therein.) For example, in *People v. Rodriguez* (1986) 42 Cal.3d 730, 762 [230 Cal.Rptr. 667, 726 P.2d 113], there was testimony that the defendant had been drinking and had "had 'a lot' " of cocaine, and that he was " 'under the influence' " in that he was " 'talkative and really hyper.' " We found that this "testimony lent only minimal and insubstantial support to appellant's theory of diminished capacity from intoxication and therefore was not sufficient to justify the requested instruction." (*Ibid.*)

The same is true here. There was no evidence that the three beers affected defendant's ability to think in any way.

"[D]efendant presented no evidence whatever, expert or otherwise, regarding the intoxicating effect, if any, which his use of ... [the beer] may have had upon his ability to form the necessary intent" to commit the crimes. (*People v. Frierson, supra,* 25 Cal.3d at p. 156, 158 Cal.Rptr. 281, 599 P.2d 587.)

Defendant contends that because the trial court did give some instructions on diminished capacity, there must have been evidence to support the theory. We have previously rejected the contention. (*People v. Pensinger, supra,* 52 Cal.3d at p. 1242, 278 Cal.Rptr. 640, 805 P.2d 899; *People v. Frierson, supra,* 25 Cal.3d at p. 157, 158 Cal.Rptr. 281, 599 P.2d 587.)

(3) Even if there had been sufficient evidence to warrant instructions on diminished capacity, the instructions given were adequate. The court gave modified versions of former CALJIC Nos. 3.35 ("Diminished Capacity to Form Specific Mental State"), 4.21 ("Voluntary Intoxication--When Relevant to Specific Intent"), 4.22 (1979 rev.) ("Voluntary Intoxication--Defined"), and 8.79 ("Diminished Capacity to Form Requisite Specific Intent to Commit Underlying Crime in Felony Murder").[4] Defendant also requested former CALJIC No. 8.77 ("Diminished Capacity--Ability to Premeditate, Deliberate, Harbor Malice, or Intend to Kill"). The court refused the request on the basis that the content was covered by CALJIC No. 3.35.

Defendant contends that because the court did not give CALJIC No. 8.77, the jury was "only instructed on the diminished capacity defense as it related to appellant's ability to form the specific intent for murder [citation] and his ability to form the specific intent to commit the underlying crime in the felony murder. [Citation.] The jury was never informed that they could also apply the diminished capacity evidence to

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[4]All CALJIC citations are to the fourth edition.

appellant's ability to premeditate, deliberate or harbor malice." A review of the instructions given belies the contention.

The jury was told that it had to determine whether defendant's mental or physical condition "prevented him from forming the specific intent or mental state essential to constitute the crime or degree of the crime with which he is charged." The court fully instructed on all the necessary specific intents and mental states for all the offenses, including first degree murder. Thus, "the jurors were told in unequivocal language that intoxication could have prevented defendant from forming the requisite specific intent for *each* of the various crimes charged." (*People v. Frierson, supra,* 25 Cal.3d at p. 155, italics in the original.)

(4) Finally, any error was harmless. The jury was instructed on two theories of first degree murder: premeditated and felony murder. Defendant does not deny that the court correctly instructed on diminished capacity as it related to the felony-murder rule. The jury found true the rape-murder special circumstance. It "thus necessarily found the killing was committed in the course of a rape or attempted rape," a theory upon which the jury was correctly instructed. (*People v. Kelly* (1992) 1 Cal.4th 495, 531 [3 Cal.Rptr.2d 677, 822 P.2d 385].) We thus can determine that the murder "verdict rested on at least one correct theory." (*Ibid.*)

(c) *Validity of Felony-murder Rule*

Defendant contends that the felony-murder rule is unsound and unconstitutional. We have rejected the contention. (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321]; *People v. Dillon* (1983) 34 Cal.3d 441, 472-476 [194 Cal.Rptr. 390, 668 P.2d 697].)

(d) *Special Circumstance Contentions*

Defendant contends that felony-based special circumstances, such as the rape- murder special circumstance of this case, are unconstitutional. They are not. (*Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed.2d 127, 107 S.Ct. 1676]; *Cabana v. Bullock* (1986) 474 U.S. 376, 386, [88 L.Ed.2d 704, 106 S.Ct. 689]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1140-1147 [240 Cal.Rptr. 585, 742 P.2d 1306].)

Defendant also contends the court erred in failing to instruct the jury on the requirement of an intent to kill. (*Carlos v. Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862].) However, an intent to kill is no longer an element of a felony-based special circumstance if the defendant is the actual killer. (*People v. Anderson, supra,* 43 Cal.3d at pp. 1147-1148, overruling *Carlos v. Superior Court, supra,* 35 Cal.3d 131.) "In this case, there is no issue of accomplice liability; the jury necessarily found that defendant was the actual killer." (*People v. Johnson* (1988) 47 Cal.3d 576, 602 [253 Cal.Rptr. 710, 764 P.2d 1087].) Accordingly, there was no requirement of an intent to kill. (*People v. Poggi* (1988) 45 Cal.3d 306, 326 [246 Cal.Rptr. 886, 753 P.2d 1082].) Contrary to defendant's contentions, the *Anderson* rule applies to this pre-*Carlos* crime. (*Poggi, supra,* at pp. 326-327).

2. *Penalty Phase*

(a) *Jury Selection*

(5) Defendant contends the court erred in excusing for cause two prospective jurors because of their views on the death penalty. It is settled that the trial court may excuse prospective jurors for cause if those jurors' views on the death penalty would prevent or substantially impair the performance of their

duties as jurors in accordance with their instructions and their oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424, [83 L.Ed.2d 841, 851-852, 105 S.Ct. 844]; *People v. Cooper* (1991) 53 Cal.3d 771, 809[281 Cal.Rptr. 90, 809 P.2d 865].) "On appeal, if the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding." (*Cooper, supra,* at p. 809.)

The record supports the trial court's rulings. The first juror said, "I think I would always vote for life imprisonment." She agreed that there was "no way" she could recommend the death penalty. The second juror said he would "automatically" vote for life. Defense counsel got him to say that he could vote for death "in the most aggravated case you can imagine." But his state of mind would make it "very difficult" for him to be fair to the state at a penalty phase. He later said that he did not think he could vote for death. These responses support the court's removal of these jurors. (*People v. Cooper, supra,* 53 Cal.3d at pp. 808-810.)

(b) *Issues Involving Informant Testimony*

Defendant contends the penalty phase testimony of the jailhouse informant regarding defendant's statements about stabbing and raping women, and about all women being potential victims, was improperly admitted. He claims use of uncorroborated informant testimony unconstitutionally undermines the reliability of the penalty determination. We have already rejected this contention. (*People v. Pensinger, supra,* 52 Cal.3d at p. 1250, fn. 13.) In addition, the independent evidence of defendant's crimes corroborated the informant's testimony. (*People v. Alcala, supra,* 36 Cal.3d at p. 624, fn. 10.)

(6) Defendant also contends the court should have excluded the evidence under Evidence Code section 352, and that it was impermissible evidence of future dangerousness. We find, however, no abuse of discretion in admitting the evidence. (*People v. Green* (1980) 27 Cal.3d 1 [19, 164 Cal.Rptr. 1, 609 P.2d 468].) Evidence of statements from defendant's own mouth demonstrating his attitude toward his victims was highly probative. Contrary to defendant's argument, the record shows that the court properly weighed the probative value against the prejudicial effect. Although we have generally condemned *expert* predictions of the defendant's future dangerousness because of their inherent unreliability (*People v. Murtishaw* (1981) 29 Cal.3d 733, 774 [175 Cal.Rptr. 738, 631 P.2d 446]; see *People v. Daniels* (1991) 52 Cal.3d 815, 882 [277 Cal.Rptr. 122, 802 P.2d 906]), we have consistently upheld prosecution argument of future dangerousness based on the evidence. (*People v. Bell* (1989) 49 Cal.3d 502, 549 [262 Cal.Rptr. 1, 778 P.2d 129]; *People v. Davenport* (1985) 41 Cal.3d 247, 288 [221 Cal.Rptr. 794, 710 P.2d 861].) The evidence was properly admitted.

(7) Defendant finally contends the court had a sua sponte duty to instruct the jury that evidence of his oral admissions should be viewed with caution. We reject the contention for two reasons. First, the instruction *was* given at the guilt phase; at the penalty phase, the court told the jury that it would be given the guilt phase instructions "to use if applicable in the penalty phase ...." This sufficed even if the instruction had been required. (*People v. Cooper, supra,* 53 Cal.3d at p. 846.) Second, there is no sua sponte duty to give the instruction at the penalty phase. (*People v. Livaditis* (1992) 2 Cal.4th 759, 782-784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)

(c) *Cross-Examination of Defense Witnesses*

Defendant contends the court erred in allowing the prosecutor to ask some of the defense witnesses questions regarding defendant's activities in jail. The questions received some negative responses and some positive responses. Since the record reflects a good faith basis for the questions, and they were relevant to impeach the defense testimony, we find no error.

(i) *Factual Background*

Phillip Arellano, a fellow jail inmate of defendant, testified about defendant's religious faith and "very good influence" on other inmates. At the end of the direct examination, the district attorney sought permission to ask on cross-examination if the witness had observed defendant gambling and extracting money from other prisoners in return for things such as telephone privileges. The questions would be based on information supplied by the two jail informants who had testified previously. The prosecutor did not want to call those witnesses again on rebuttal, but stated he would if necessary. When defendant objected to the questions, a hearing was held outside the presence of the jury.

Arellano testified at the hearing that he had seen defendant gambling but had not seen him extracting money from other prisoners. Defendant withdrew his objection to questions about gambling, but reiterated it regarding extracting money. The court overruled the objection on the basis that the "answers are in the negative." In front of the jury, Arellano repeated that he had seen defendant gamble, but had not seen him extracting money. The district attorney later asked another fellow inmate testifying for the defense the same questions; each question elicited a negative response.

Upon a further defense objection, the court indicated it was allowing the questions because the district attorney stated he had a factual basis for the questions, and that they "would go to the bias and prejudice" of the witnesses. The district attorney reiterated that the questions were based on "information from at least two witnesses." He had not yet decided whether he was going to call those two witnesses on rebuttal. The court then stated that a new hearing should be held if the district attorney intended to ask future witnesses similar questions.

Another hearing was held outside the presence of the jury prior to the testimony of the next defense witness. The prosecutor stated that, if the witness also testified about defendant's religious beliefs, he wanted to ask the questions about defendant's gambling and extracting money, and also about whether defendant had engaged in mutual combat in jail and had planned an escape. The court ruled that the probative value of the latter questions was outweighed by the prejudicial effect, and it excluded them. It also ruled that it would not allow the questions about gambling and extracting money unless the district attorney presented in rebuttal the witnesses who supplied the information. Otherwise, the court was concerned that "if we keep asking the questions in the negative, we're getting into an area which will create a problem unless we have some rebuttal witnesses." The district attorney responded that he was not sure if the rebuttal evidence was important enough to present. When the next witness indicated he would give negative answers to all the questions, the court disallowed them under Evidence Code section 352.

The court later stated that if the defense elicited testimony that defendant was a "calming influence" on fellow inmates, it would allow questions concerning defendant engaging in mutual combat. In response to the ruling, defense counsel stated that he would not call a certain witness.

The next defense witness was Deputy Sheriff Engen. Engen testified that defendant was a positive influence on other inmates. On cross-examination, the district attorney asked if it had been brought to his attention that defendant "was extracting commissary from other prisoners for phone calls." The witness answered that "yes," one inmate had told him that. On redirect examination, Engen testified that defendant had the "ability to calm the other inmates." On recross-examination, the prosecutor asked if the witness was aware of defendant "ever engaging in mutual combat with other prisoners while you were on duty ...." He responded, "No, not while I was on duty."

The next day, a juror sent the court a note stating, "The prosecution mentioned extracting money for phone calls. Please ask him to explain what that means." Defendant moved to "strike that part of the testimony" and to prohibit the prosecutor from arguing it; he also asked that the jury "request not be answered." The court denied the request to strike the testimony, but "in an abundance of caution" instructed the prosecutor not to comment on it in argument. The court did not respond to the juror's note.

(ii) *Analysis*

Defendant contends the court erroneously allowed the questions of the two inmate witnesses regarding gambling and extracting money (eliciting one positive response from one witness regarding gambling; the rest of the responses were negative), and the questions of the deputy sheriff regarding extracting money (eliciting a positive response) and mutual combat (eliciting a negative response). He also contends the court should have responded to the jury note. We discuss his several arguments in order.

(8) Defendant first contends the evidence did not come within one of the aggravating factors of section 190.3. The

evidence, however, was not introduced in aggravation but to impeach the defense evidence. "We have previously observed that such impeachment is permissible when character evidence is introduced at the penalty phase. As we observed in *People v. Siripongs* (1988) 45 Cal.3d 548 [247 Cal.Rptr. 729, 754 P.2d 1306]: 'It is well established that, "[w]hen a defense witness, other than the defendant himself, has testified to the reputation of the accused, the prosecution may inquire of the witness whether he has heard of acts or conduct by the defendant inconsistent with the witness' testimony." (*People v. Wagner* (1975) 13 Cal.3d 612, 619 [119 Cal.Rptr. 457, 532 P.2d 105].) So long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually took place, they may so inquire.' (*Id.* 45 Cal.3d at p. 578.) Thus, we 'reject[ed] defendant's claim that cross-examination under Evidence Code section 1102 is impermissible at the penalty phase whenever character testimony is introduced in mitigation rather than to show conformity with a particular character trait. A defendant has no right to mislead the jury through one-sided character testimony during either the guilt or penalty trial. We do not believe that defendant was entitled to elicit testimony suggesting that he was honest, and at the same time to preclude the People from introducing contrary evidence.' (*Ibid.*)" (*People v. Fierro* (1991) 1 Cal.4th 173, 239 [3 Cal.Rptr.2d 426, 821 P.2d 1302].)

Similarly, the questions here were appropriate to impeach the testimony about defendant's religious conversion and calming influence in jail. Defendant claims the evidence was not introduced as rebuttal, citing the district attorney's uncertainty whether he would present the jailhouse informants as rebuttal witnesses (he ultimately did not). However, the questions were clearly intended to impeach the defense witnesses, and were admitted for that purpose. It did not matter that they were asked on cross- examination during the defense

portion of the trial rather than during the prosecution's rebuttal portion. (See *People v. Fierro, supra,* 1 Cal.4th at p. 239.)

Defendant next complains that he was not given advance notice of the evidence in violation of the notice requirement of section 190.3. Since he did not object on that basis at trial, the issue is not cognizable on appeal. (*People v. Cooper, supra,* 53 Cal.3d at p. 842; *People v. Carrera* (1989) 49 Cal.3d 291, 334 [261 Cal.Rptr. 348, 777 P.2d 121].) Moreover, no notice is required when the evidence is introduced to rebut defense mitigating evidence. (§ 190.3; *People v. Harris* (1981) 28 Cal.3d 935, 961 [171 Cal.Rptr. 679, 623 P.2d 240].)

Defendant contends the questions were not asked in good faith. The record does not support the contention. The district attorney stated the factual basis for the questions. Defendant did not claim there was no factual basis. He did not, quite reasonably, insist that the informants supplying the information actually testify on rebuttal. The positive responses that were elicited as to two of the questions also support the claim of good faith.

Defendant contends the questions of Deputy Engen violated a court order that they not be asked without a further in camera hearing. We disagree. At one point, the court did indicate a new hearing should be held before such questions were asked. Thereafter, a new hearing *was* held, and the court made further rulings. It did not indicate that yet another hearing would be required. The record is not clear whether the question regarding extracting money came within the rulings, although the question regarding mutual combat clearly was permitted. If defendant believed any question violated the court's ruling, he should have objected at that time. He did not. Upon an objection, a hearing could have been held. Since the witness gave a positive answer to the question about extracting money, the court undoubtedly would have allowed it. Indeed, when

defendant did object the next day, the court refused to strike the testimony.

Defendant also contends that the *form* of the questions was improper. He claims that questions admissible under Evidence Code section 1102 must be prefaced by the words "have you heard." Defendant did not object on that basis; the issue is thus not cognizable on appeal. (*People v. Green, supra,* 27 Cal.3d at p. 22 & fn. 8.) In any event, penalty phase cross-examination of defense witnesses in mitigation is not so restricted. (*People v. Fierro, supra,* 1 Cal.4th at p. 239.)

(9) Finally, defendant contends the court was required to respond to the juror's note. Although the court must respond to jury questions during deliberations regarding "any point of law arising in the case" (§ 1138; see *People v. Beardslee* (1991) 53 Cal.3d 68, 97 [279 Cal.Rptr. 276, 806 P.2d 1311]), the note had nothing to do with the law, but with a fact. The juror merely requested that the prosecutor be asked to explain what "extracting money for phone calls" means. Although defense counsel asked that the testimony be stricken, he also asked "for an order directing the prosecutor not to argue it and ... that this request not be answered ...." Defendant obviously did not want the jury given a further explanation of this evidence. The court granted these defense requests, which effectively precluded any response to the note. The issue has thus been waived on appeal. (*People v. Thoi* (1989) 213 Cal.App.3d 689, 698 [261 Cal.Rptr. 789].) Given the nature of the note--a request of the prosecutor, not the court--we also find no error.

(d) *Contentions Regarding Other Crimes Evidence*

Defendant raises a number of contentions regarding the evidence of other crimes, most of which we have already rejected. Admission of prior unadjudicated crimes does not deny him due process or a reliable death judgment. (*People v. Medina* (1990) 51 Cal.3d 870, 906-907 [274 Cal.Rptr. 849, 799 P.2d 1282]; *People v. Balderas* (1985) 41 Cal.3d 144, 204-205 [222 Cal.Rptr. 184, 711 P.2d 480].) The court is not required to instruct the jury that it could consider other crimes evidence only if it *unanimously* found such crimes had been proved beyond a reasonable doubt. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1273 [270 Cal.Rptr. 451, 792 P.2d 251].) The court is not required to enumerate the other crimes that the jury should consider or to instruct on the elements of those crimes. (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207 [5 Cal.Rptr.2d 796, 825 P.2d 781].)

The court told the jury at the penalty phase that it would be given the guilt phase instructions "in the jury room to use if applicable in the penalty phase of this trial." It also instructed, "As to evidence of other crimes committed by the defendant not charged in this case, such offenses before they can be considered must be proven to you beyond a reasonable doubt, as has previously been defined to you." The court refused defendant's request to repeat the entire reasonable doubt instructions. Such instructions were given at the guilt phase.

Defendant contends the court was required to repeat all of the reasonable doubt instructions at the penalty phase. We disagree. The specific reference to the guilt phase instructions, which were made available to the jury, sufficed. (See *People v. Cooper, supra,* 53 Cal.3d at p. 846; *People v. Brown* (1988) 46 Cal.3d 432, 460 [250 Cal.Rptr. 604, 758 P.2d 1135].)

(c) *Instructions and Argument on Mitigating Evidence--Section 190.3, Factor (k)*

(10a) Defendant contends that the trial court's instructions and the prosecutor's argument led the jurors to believe, incorrectly, that they were not permitted to consider defendant's mitigating evidence. Our review of the record does not support the contention.

As already mentioned, defendant's case in mitigation consisted of evidence to the effect that he had experienced a religious conversion in prison and had subsequently behaved well. To present this case defendant called eight witnesses, including his pastor, a deputy sheriff who testified that defendant had a calming effect on other prisoners, four inmates who testified to defendant's sincerity, including one who testified that defendant had persuaded him not to commit suicide, defendant's mother, and the director of a religious organization that ministered to prisoners.

At the close of the penalty phase the trial court instructed the jury in the language of section 190.3, factor (k) (hereafter, factor (k)). Thus, the jurors heard that they were to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The trial court denied defense counsel's request to modify the instruction to refer specifically to "evidence of the defendant's character, background, history, mental condition and physical condition." Although the court agreed with counsel that factor (k) was a catch-all provision and permitted the jury to consider such evidence, the court expressed "reluctan [ce]" to "change a CALJIC instruction" that followed the statute "verbatim."

During closing argument, the prosecutor incorrectly argued that factor (k) referred to "some factor at the time of the offense

that somehow operates to reduce the gravity for what the defendant did" but not "to anything after the fact or later." On appeal, defendant contends that the jurors probably accepted the prosecutor's interpretation of factor (k) and, thus, disregarded the extensive testimony about defendant's religious conversion.

In essence, defendant asserts the type of claim that we addressed in *People v. Easley* (1983) 34 Cal.3d 858 [196 Cal.Rptr. 309, 671 P.2d 813]. In that case, which we decided two years after defendant's trial, we recommended that courts in the future adorn factor (k) with the explanatory gloss that juries are permitted to consider "any other 'aspect of defendant's character or record ... that the defendant proffers as a basis for a sentence less than death.' " (*Easley, supra,* 34 Cal.3d at p. 878, fn. 10.) Our recommendation was motivated by the argument that a jury instruction in the language of factor (k) would violate the federal Eighth Amendment if understood by the jury as barring consideration of character and background evidence. The Eighth Amendment, of course, requires that the sentencer be permitted to consider such evidence. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-112 [71 L.Ed.2d 1, 102 S.Ct. 869]; *Lockett v. Ohio* (1978) 438 U.S. 586, 602-609 [57 L.Ed.2d 973988-993, 98 S.Ct. 2954]; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-9 [90 L.Ed.2d 1, 6-9, 106 S.Ct. 1669] [regarding good behavior in prison].)

(11) Since our decision in *Easley,* however, the United States Supreme Court has held that the language of factor (k) satisfies the federal Eighth Amendment. (*Boyde v. California* (1990) 494 U.S. 370, 372, 377-386, 108 L.Ed.2d 316, 324, 326-333, 110 S.Ct. 1190] (*Boyde*).) The court reasoned that factor (k) does not, as the petitioner in that case argued, "limit the jury's consideration to 'any other circumstance *of the crime* which extenuates the gravity of the crime.' " (*Boyde, supra,* 494 U.S. at p. 382 [108 L.Ed.2d 330], italics in original.) Instead, the factor directs the jury "to consider *any other*

circumstance that might excuse the crime, which certainly includes a defendant's background and character." (*Ibid.,* italics in original.) The high court found its conclusion to be reinforced by the other sentencing factors, which "allow for consideration of mitigating evidence not associated with the crime itself, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, and youth. When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence." (*Id.,* at p. 383.)

To be sure, the high court's holding in *Boyde* does not prevent a defendant from asserting a claim to the effect that prosecutorial argument, or other factors, led the jury to misinterpret factor (k). (*Boyde, supra,* 494 U.S. at p. 384 [108 L.Ed.2d at pp. 331-332].) However, in evaluating such claims we do not treat comments by attorneys as if they had the same force as the trial court's instructions on the law. This is because "[t]he former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter ... are viewed as definitive and binding statements of the law." (*Ibid.*)

Rather than creating a rule to the effect that incorrect remarks by attorneys about the permissible scope of mitigating evidence are presumed to have misled the jury, *Boyde* teaches that there is constitutional error only if it is reasonably likely that such remarks led the jurors to understand the trial court's instructions as precluding consideration of relevant mitigating evidence offered by the defendant. (*Boyde, supra,* 494 U.S. at pp. 378-381, 386 [108 L.Ed.2d at pp. 327-330, 332-333.) *Boyde* also teaches that comments by attorneys "must be judged in the context in which they are made." (*Id.,* at p. 385 [108 L.Ed.2d at p. 332.) To the same effect, we have said that we will examine pre-*Easley* cases "on [their] own merits to

determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion ...." (*People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17 [230 Cal.Rptr. 834, 726 P.2d 516].) With regard to the standard of review in cases such as this, *Brown, supra,* 40 Cal.3d 512, and *Easley, supra,* 34 Cal.3d 858, should not be understood as requiring more or less than *Boyde, supra,* 494 U.S. 370.

(10b) Applying this analysis to the case before us, we do not consider it reasonably likely that the jurors believed the law required them to disregard defendant's mitigating evidence. Several considerations lead us to this conclusion.

It is true that the prosecutor during closing argument suggested a narrow and incorrect interpretation of factor (k). The factor, he told the jury, "says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some ... factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. [¶] It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity." Any impact this argument may have had, however, was immediately blunted by defense counsel's objection, which led the court to remind the jury that lawyers' comments were "not evidence" but "argument," and "to be placed in [their] proper perspective." (Cf. *Boyde, supra,* 494 U.S. at p. 384 [108 L.Ed.2d at pp. 331-332] [recognizing that such comments "are likely viewed as the statements of advocates," especially when "billed in advance to the jury as matters of argument, not evidence"].)

Later in his closing argument, the prosecutor implicitly conceded the relevance of defendant's mitigating evidence by devoting substantial attention to it. The prosecutor also

suggested, properly, how the jury might weigh defendant's evidence against the evidence in aggravation. To quote: "The law in its simplicity is that ... if the aggravating factors outweigh the mitigating, the sentence the jury should vote for should be the death penalty. [¶] How do the factors line up? The circumstances and facts of the case, the defendant's other acts showing violence, Mrs. Pensinger and Mrs. Stone, ... Blaine Pensinger, the defendant's two prior convictions line up against really nothing except defendant's newborn Christianity and the fact that he's 28 years old. This is not close." Obviously, this exercise by the prosecutor had a point only if it was contemplated that the jury *would* consider defendant's evidence. (Cf. *People v. Mason* (1991) 52 Cal.3d 909, 965 [277 Cal.Rptr. 166, 802 P.2d 950], and *People v. Guzman* (1988) 45 Cal.3d 915, 957[248 Cal.Rptr. 467, 755 P.2d 917] [in which the attention paid by prosecutors in closing argument to defense evidence was found to have undercut suggestions that such evidence was not mitigating under factor (k)].)

For the jury to have accepted a narrow view of factor (k) in this case would have meant disregarding all of defendant's mitigating evidence, since the testimony of his eight penalty phase witnesses was all directed to his religious conversion and consequent behavior in prison. Indeed, it would have meant disregarding virtually the entire penalty phase, since the testimony of the prosecution's two witnesses occupies only eleven pages of the transcript. We think it unlikely, however, as did the high court in *Boyde,* "that reasonable jurors would believe the court's instructions transformed all of [defendant's] 'favorable testimony into a virtual charade.' " (*Boyde, supra,* 494 U.S. at p. 383 [108 L.Ed.2d at p. 331].) The high court's observation is especially apt when the trial court, as here, has also instructed the jury to consider "all of the evidence which has been received during any part of the trial" in determining the penalty. (Ibid.)

Defense counsel, in his own closing argument, strongly reinforced the correct view that defendant's religious conversion was proper mitigating evidence. (Cf. *People v. Guzman, supra,* 45 Cal.3d at p. 957 [holding that a prosecutor's comments about factor (k) were cured by defense counsel's comments].) Responding to the prosecutor's earlier argument that factor (k) permitted the jury to consider crime-related evidence only, defense counsel presented the following, proper interpretation of the law: "section (k) may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phrase. It was designed to include, not exclude, that kind of evidence. [¶] Any jury ... that was in the position of trying to determine the fairest possible sentences, select them between death or life without possibility of parole, would not only want that kind of evidence but would need it to make an intelligent decision." The court did not permit the prosecutor to argue in rebuttal.

On this record, it is not reasonably likely that the jury understood the court's instructions as precluding consideration of defendant's mitigating evidence. While the court did not embellish the language of factor (k), that fact standing alone does not support a claim of error. (See *Boyde, supra,* 494 U.S. at p. 381 [108 L.Ed.2d 329-330; *People v. Mason, supra,* 52 Cal.3d at p. 965.) Moreover, while the prosecutor's interpretation of factor (k) was clearly incorrect, any force it might have had was blunted by the court's instruction to consider "all of the evidence," the prosecutor's own discussion of defendant's mitigating evidence, and defense counsel's correct statement of the law. Accordingly, we find no instructional error.

(12) Defendant has asked us to judicially notice the transcript of oral argument before the United States Supreme Court in *Boyde, supra,* 494 U.S. 370, in which, in response to questioning, the Attorney General said that the prosecutor in

this case "misled the jurors." The dissent relies substantially on this "concession," and appears to argue that we should judicially notice the transcript. We disagree. We have examined the transcript of the oral argument in *Boyde,* and find nothing in it relevant to the proper resolution of *this* case. Even if a matter is a proper subject of judicial notice, it must still be *relevant.* (Evid. Code, § 350; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578 [136 Cal.Rptr. 751].)

The meaning of the high court's opinion in *Boyde, supra,* 494 U.S. 370, must be gleaned from the opinion itself. Moreover, whatever critical remarks might have been made during oral argument in *Boyde* about the prosecutor's argument in the case before us were made without the benefit of a full examination of the record--an examination that the opinion in *Boyde* requires us to undertake before concluding that constitutional error has occurred. (*Boyde, supra,* 494 U.S. at p. 385 [108 L.Ed.2d 332].) Contrary to the implication of the dissent, we are not ignoring the officially expressed views of the Attorney General. In *this* case, he is arguing vigorously, based upon the entire record, that the jury was not misled. It is our duty to decide the issue based on the arguments and record of *this* case, not comments taken out of context in a different case. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 974-975 [4 Cal.Rptr.2d 765, 824 P.2d 571] [pretrial evaluation of a case by a supervising deputy district attorney irrelevant to our assessment of the prejudicial effect of any errors at trial].) We have performed this duty. The request to take judicial notice is therefore denied.

(f) *Other Instructional Contentions*

Defendant contends that the instructions impermissibly established a mandatory sentencing formula. The jury was instructed that, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall

impose a sentence of death. [¶] However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole." In *People v. Brown, supra,* 40 Cal.3d 512, we upheld the instruction, but identified two interrelated ways in which it might potentially mislead the jury. First, the jury might believe it should merely count the aggravating and mitigating factors. Second, the jury might understand the instructions as allowing or requiring it to return a death verdict without deciding that that penalty was appropriate under the facts and circumstances of the particular case. (See *People v. Hayes* (1990) 52 Cal.3d 577; 642 [276 Cal.Rptr. 874, 802 P.2d 376].) To determine whether the jury may have been misled to defendant's prejudice in these regards, we have reviewed the entire record. (*Ibid.*)

In *Boyde, supra,* 494 U.S. at pages 376-377 [108 L.Ed.2d at pages 326-327], the high court upheld these same instructions against federal constitutional attack. Assuming "our traditional *Brown* analysis" is still necessary after *Boyde* (see *People v. Gonzalez, supra,* 51 Cal.3d at p. 1231, fn. 30), we find no legitimate basis for believing the jury was misled. Indeed, the district attorney expressly argued that the jury is "supposed to go through a weighing process of the factors," and that "if the aggravating factors outweigh the mitigating, the sentence the jury *should* vote for *should* be the death penalty." (Italics added.) The jury was not misled about its sentencing function. (See *id.* at pp. 1230-1231.)

Defendant reiterates other contentions which we have previously rejected. He claims that giving the "no sympathy" instruction at the guilt phase was error since the court referred to those instructions at the penalty phase. There was no error. (*People v. Sanders* (1990) 51 Cal.3d 471, 528 [273 Cal.Rptr. 537, 797 P.2d 561].) As discussed above, the jury was not misled regarding its obligation to consider all of the defense's

mitigating evidence. (*People v. Gonzalez, supra,* 51 Cal.3d at pp. 1224-1226; *People v. Brown, supra,* 46 Cal.3d at p. 460.) Multiple use of the fact of rape (felony- murder rule, special circumstance, and aggravating circumstance) was proper. (*People v. Gates* (1987) 43 Cal.3d 1168, 1188-1190 [240 Cal.Rptr. 666, 743 P.2d 301].) The court need not clarify the section 190.3, factor (b), instruction to state that it refers to violent criminal conduct *other* than the crimes charged in this proceeding. (*People v. Sanders, supra,* 51 Cal.3d at p. 528.) Finally, the court was not required to instruct the jury that it could return a verdict of death only if it were persuaded beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances and that death was the appropriate penalty. (*People v. Marshall* (1990) 50 Cal.3d 907, 935-936 [269 Cal.Rptr. 269, 790 P.2d 676].)

(g) *Propriety of the Death Penalty*

Defendant contends the 1978 death penalty law is unconstitutional. It is not. (*People v. Fierro, supra,* 1 Cal.4th at p. 255.) Defendant contends we must engage in a comparative sentence review to determine whether his sentence is disproportionate. We need not. (*People v. Cox* (1991) 53 Cal.3d 618, 690- 691 [280 Cal.Rptr. 692, 809 P.2d 351].) Given the nature of defendant's crimes, the death sentence is not so disproportionate that it shocks the conscience and offends fundamental notions of human dignity. (*Id.* at p. 690.)

II.

HABEAS CORPUS

A. *Factual Background*

Defendant filed a petition for a writ of habeas corpus, supported by various declarations, contending that his trial counsel was ineffective for not investigating and presenting evidence that he suffered from "Post-Traumatic Stress Disorder" (PTSD) because of his "combat experiences" in Vietnam.

The declaration of Dr. H.R. Kormos, a psychiatrist retained by the defense to examine defendant, recited the following factual claims by defendant. "Immediately after [defendant's] deplaning [in Vietnam], the airstrip came under fire ...." "Several times daily and sometimes also at night Mr. Payton went on helicopter missions. He flew Cobra gunships as well as HU-ID's, helicopter gunships. His unit encountered enemy activity routinely. It flew reconnaissance missions, searching for enemy locations and land mines, and backed infantry units with air strikes." Defendant's unit "often served as the point unit ..., which required a single helicopter gunship to serve as a decoy so as to literally draw, and often receive, enemy fire in an attempt to flush out the Vietcong in order that U.S. troops could identify enemy locations and respond. For many of these helicopter crews these operations amounted to suicide missions.

"During Mr. Payton's second mission, the helicopter's hydraulic system was hit by bullets and the craft crashlanded, after spinning out of control at 1200 feet altitude. Thereafter the crew was pinned down by enemy fire for three hours. With great difficulty, they were finally rescued."

Defendant "remembers witnessing avoidable deaths: a doorgunner accidentally shooting three American soldiers; a

sergeant on the flight line decapitated by a rotor blade." "After about six weeks in Vietnam, his helicopter was sent as the point ship on a night mission, with orders to try to rescue the crew of a ship downed earlier. While firing his machinegun, Mr. Payton saw enemy tracer bullets coming right at him and then he was knocked out by a round. He fully expected death, but when he came to, he discovered to his amazement that his flakjacket had stopped the bullet."

Dr. Kormos's declaration stated that "[t]his experience was extremely traumatic for" defendant. "[H]e himself was daily placed in a situation in which he was totally helpless: as a machinegunner in a helicopter, he was at the same time at the mercy of the enemy shooting at him while completely dependent on the skill and the judgment of the pilot and the co-pilot." These experiences led defendant to use drugs. Dr. Kormos believed that this "traumatization," i.e., "the sense of being out of control and of being dominated by the violence and brutality that constantly surrounded him, eventually overwhelmed him," and ultimately "shaped his behavior on the night of the homicide."

"While in Vietnam and helplessly exposed to enemy fire at the door of his helicopter, he could try to regain his mastery in only one way: by firing his machinegun and riddling any target he could hit. It was this same reflex which resulted in the rape-homicide and the attempted murders."

Dr. Kormos believed that defendant suffered from PTSD and, therefore, at the time of the crimes, "lacked substantial capacity to appreciate the wrongfulness of his conduct, and to conform his conduct to the requirements of the law. In addition, due to this mental disorder, his capacity to form specific intent to kill or commit attempted murder was diminished."

A declaration by Bob Mertz, a counselor for Vietnam veterans, contained similar descriptions of defendant's alleged combat experiences.

Based upon these and related allegations, we issued an order to show cause. In his return, the Attorney General questioned whether defendant had actually had these combat experiences. Defendant's denial to that return included another declaration by Dr. Kormos which reiterated his "opinion" that defendant "was indeed significantly involved in and exposed to combat activities during his stay in Vietnam." The declaration discussed the basis for this opinion at length, and reiterated the view that defendant suffered from PTSD.

We appointed the Honorable Robert E. Rickles, retired Justice of the Court of Appeal, Fourth Appellate District, Division Two, as our referee to take evidence and make specified findings of fact. After a lengthy evidentiary hearing, the referee issued his report.

He found that defendant's claims regarding his combat experiences were false. "The true facts were that Mr. Payton had never experienced combat and in particular had never experienced the instances described to Mr. Mertz and Dr. Kormos. Payton had arrived in Viet Nam on August 9, was in Casual company until August 25, assigned to Camp Eagle from August 25 until September 13, evacuated back on September 13 for treatment as a drug abuser, and returned to Hawaii on September 25. Payton's total exposure to Viet Nam was approximately 22 days. During this 22 days he served as a helicopter mechanic." The referee found that defendant had lied to his appellate counsel, to Mertz, and to Dr. Kormos.

In a supplemental declaration filed shortly before the evidentiary hearing, Dr. Kormos stated that he had recently interviewed defendant two more times; defendant told him that

he had not, in fact, had these combat experiences. These latest interviews, Dr. Kormos declared, "allowed me to appreciate even more than I had previously, how crucially significant his performance in the military and the question of his participation in combat in particular, had been to him. Likewise I was again impressed by the vital role his experiences in Vietnam had on him on the night he committed the crimes for which he is now facing the death penalty." Dr. Kormos concluded that the "fact that *certain details* of Mr. Payton's experiences in Vietnam are not what I initially believed them to be does not alter my opinion that Mr. Payton was suffering from this mental disorder at the time of the rape, murder and attempted murders, and, as a result of the disorder, lacked substantial capacity to appreciate the wrongfulness of his conduct, and to conform his conduct to the requirements of the law. In addition, due to his mental disorder, his capacity to form specific intent to kill or to commit attempted murder was diminished." (Italics added.)

The referee found that despite defendant's lies, evidence could have been presented that defendant suffered from PTSD, primarily the testimony of three experts retained after trial by the defense--Dr. Kormos, Dr. John P. Wilson, and Dr. Thomas Williams. The latter two believed that defendant suffered from PTSD disorder which, combined with other personality disorders, caused him to commit the crime while in a disassociative state.

The referee found that prior to trial, defense counsel "had reports from four psychiatrists[,] none of whom mentioned Payton was suffering from any psychiatric disorder." Defendant "did not mention any traumatic military experiences to any of the people who were trying to establish a possible psychological defense." Nevertheless, the referee found that trial counsel "at least should have investigated the defense of PTSD even though he might later have rejected that defense"; that counsel "should have presented evidence of PTSD at the penalty phase of the

trial"; and that if defendant had "thought about such a defense he could have and would have lied to [trial counsel] just as he did" later.

The referee found, however, that counsel would not have been "incompetent by failing to produce evidence of a post-traumatic stress disorder at the guilt trial"; the "evidence of PTSD was weak and almost totally unbelievable." Specifically, he found that "Dr. Kormos's testimony was not only illogical, it was totally without any credibility at all," and that the testimony of Drs. Wilson and Williams would also not have substantially strengthened the defense.

B. *Discussion*

(13a) Defendant contends his trial counsel rendered ineffective assistance by failing to investigate or present evidence of PTSD. **(14)** Such a contention has two components. Defendant has the burden of proving both that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694, 80 L.Ed.2d 674, 693-694, 104 S.Ct. 2052]; *In re Marquez* (1992) 1 Cal.4th 584, 602-603 [3 Cal.Rptr.2d 727, 822 P.2d 435].) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra,* 466 U.S. at p. 694 [80 L.Ed.2d at p. 698]; accord, *In re Marquez, supra,* 1 Cal.4th at p. 603.)

(15) The referee's findings of fact, though not binding on this court, are given great weight when supported by the record. His legal conclusions and resolutions of mixed questions of law and fact, such as whether counsel's performance was inadequate and whether such inadequacy prejudiced the defense, are subject

to independent review. (*In re Marquez, supra,* 1 Cal.4th at p. 603.)

(13b) We disagree with the referee's finding that counsel was deficient in not investigating and presenting (at the penalty phase) the defense of PTSD. As the referee found, *none* of the four psychiatric reports indicated that defendant was suffering from that disorder. "Competent representation does not demand that counsel seek repetitive examinations of the defendant until an expert is found who will offer a supportive opinion." (*People v. Williams* (1988) 44 Cal.3d 883, 945 [245 Cal.Rptr. 336, 751 P.2d 395]; accord *In re Fields* (1990) 51 Cal.3d 1063, 1075 [275 Cal.Rptr. 384, 800 P.2d 862] ["When three experts concur in a diagnosis, competent counsel might reasonably believe it pointless to search further in the hope of finding an expert who would offer a different diagnosis, or facts that would support such a view."].)

Furthermore, defendant did not invent his combat experiences until *after* he had been convicted, and there was no other evidence of combat experience. Despite later defense attempts to downplay the significance of actual combat (after discovery that the claims were false), such combat was the original underpinning of the alleged defense, and was what made it appear plausible. There was no evidence to alert defense counsel to a need to explore the defense. Since counsel was not required to investigate the defense, he was also not required to present the evidence.

Defendant has also not proven prejudice even if we assume counsel should have presented evidence of the kind presented at the posttrial evidentiary hearing. As the referee found, evidence of PTSD was weak and incredible. If the evidence had been presented at either the guilt or penalty phase, the jury would undoubtedly have given it little weight once it learned that the primary basis for the initial diagnosis--the vivid and

compelling descriptions of defendant's alleged combat experiences in Vietnam--was sheer invention. While Dr. Kormos may have believed, as he stated in his supplemental declaration, that the alleged combat experiences were merely "certain details of Mr. Payton's experiences in Vietnam," no reasonable jury would have so considered them. At the penalty phase, evidence that defendant had lied about his combat experiences would have severely damaged the credibility of the jailhouse redemption defense that counsel *did* present. The failure to present this defense does not undermine confidence in the guilt or penalty verdict.

DISPOSITION

The judgment is affirmed. The petition for a writ of habeas corpus is denied on the merits.

Lucas, C. J., and Panelli, J., Baxter, J., and George, J., concurred.

DISSENT BY: KENNARD, J.,

DISSENT:

Concurring and dissenting.

Two years ago, in oral argument before the nation's highest court in *Boyde v. California* (1990) 494 U.S. 370 [108 L.Ed.2d 316, 110 S.Ct. 1190] (*Boyde*), the California Attorney General conceded that in the case now before us the prosecutor in his closing summation "misled the jurors" by arguing that the jury could not consider evidence, presented at the penalty phase of this capital case, that defendant had experienced a religious

awakening.[1] Now, the Attorney General argues the contrary. The majority is persuaded by his argument. I am not.

In my view, there is a reasonable likelihood that the prosecutor's closing argument, which misconstrued an ambiguous instruction by the trial court, misled the jury into believing that it could not consider any of the evidence defendant had offered at the penalty phase. When defendant objected to the improper argument, the trial court neither condemned nor corrected the prosecutor's misstatement of legal principles. As a result, the jury was erroneously permitted to infer that the prosecutor's interpretation of the law was sound. The error requires reversal of the judgment of death against defendant.

I.

At the penalty phase of this capital trial, defendant called eight witnesses. They testified that in the 17 months since his arrest defendant had become a "born again" Christian, causing him to fundamentally alter his outlook and behavior.

Deputy Sheriff Vincent Engen, who was in charge of defendant's module at the Orange County jail, testified that defendant held Bible-study sessions with the other inmates lasting from one to three hours, that he appeared to have a leadership role with the other inmates, and that his influence had been "positive." Deputy Engen was "glad" defendant was in the module "[b]ecause of his ability to calm the other inmates."

Pastor John Kirk, who had known defendant for 10 years, visited defendant at the jail approximately 7 times. He observed "a great remorse and regret in [defendant] for ... the things that

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[1]The pertinent details are discussed in footnote 2, *post.*

he had done," and believed that defendant was "sincere in his ... commitment to the Lord." Those views were shared by Barbara Seglie, the missions director for the Eagles Nest Christian Fellowship. At defendant's request, Seglie held approximately fifteen Bible- study sessions with defendant at the county jail, lasting from two to five hours. She testified that defendant's religious conversion "definitely has changed his life." When she first met defendant, his comments reflected an interest only in his own needs, but in later sessions he began to show a concern for other inmates, and eventually inmates came to defendant for counseling.

Four county jail inmates--Phillip Arellano, Dennis Howie, Keith Dandley, and Bruno Palko--testified that defendant's religious conversion was sincere. Dandley and Palko described defendant as having a "positive" and "calming" influence on the other inmates. Dandley also credited defendant with saving his life by talking him out of committing suicide.

Defendant's mother, too, testified that her son's religious awakening was genuine, and that he had become a changed man since his arrest. She visited her son regularly in jail, and described him as being "totally immersed in the Lord."

Defendant asked the trial court to instruct the jury that it could consider in mitigation "evidence of the defendant's character, background, history, mental condition and physical condition." The prosecutor objected. Although the court agreed with defendant that the jury was entitled to consider such evidence in mitigation, it refused to modify the standard instruction (former CALJIC No. 8.84.1). That instruction, echoing the requirements of Penal Code section 190.3, told the jury it should base its penalty determination on certain specified factors. The only one of those factors to which defendant's mitigating evidence could possibly apply was that described in Penal Code section 190.3, factor (k) (factor (k)): "Any other

circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

In closing argument, the prosecutor argued to the jury that the evidence presented by defendant at the penalty phase could not be considered under factor (k), because that factor "doesn't refer to anything after the fact," that is, after commission of the murder. (As the Attorney General now concedes, the prosecutor's characterization of the scope of factor (k) was incorrect.) Defense counsel asked to approach the bench, and, out of the hearing of the jury, objected that the prosecutor's argument was "completely contrary to what ... [factor] 'k' was designed to apply to." The trial court overruled the objection, deciding that defendant and the prosecutor could each argue *to the jury* their differing interpretations of the scope of factor (k). The court then told the jury that the comments of the prosecutor and defense counsel were "not evidence" and were "to be placed in [their] proper perspective."

Thus authorized by the trial court to argue his misinterpretation of factor (k), the prosecutor told the jury several times that it could not legally consider defendant's mitigating evidence: "[Y]ou have not heard during the past few days any legal evidence [in] mitigation. ... [¶] You have not heard any evidence of mitigation in this trial." Although the prosecutor also argued to the jury that even if defendant's evidence could be considered, it was of little value, he prefaced this argument by saying, "I don't really want to spend too much time on it because ... I don't think [defendant's evidence] comes under any of the eleven factors ...."

II.

Under the Eighth Amendment to the United States Constitution, a sentencing jury in a capital case must be permitted to "consider and give effect to all relevant mitigating evidence" offered by the defendant. (*Boyde, supra,* 494 U.S. at pp. 377-378 [108 L.Ed.2d at pp. 326-328]; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [90 L.Ed.2d 1, 6-7, 106 S.Ct. 1669]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [71 L.Ed.2d 1, 8, 102 S.Ct. 869]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [57 L.Ed.2d 973. 988-993, 98 S.Ct. 2954] (plur. opn. of Burger, C.J.).) In California, the jury's consideration of mitigating evidence is limited by Penal Code section 190.3, which sets forth the aggravating and mitigating factors a jury may consider in deciding whether to return a judgment of death. In *People v. Easley* (1983) 34 Cal.3d 858 [196 Cal.Rptr. 309, 671 P.2d 813] (*Easley*) and cases following it, we recognized that former CALJIC No. 8.84.1, which was given here and which describes to the jury the factors it may consider under section 190.3, is "potentially confusing." We expressed concern that a jury might construe the "factor (k)" portion of the instruction "to permit consideration only of circumstances that relate to the 'gravity *of the crime*' and not of circumstances that relate to the general character, family background or other aspects *of the defendant.*" (At p. 878.) Such a construction, we held, would violate the Eighth Amendment by impermissibly restricting the jury's consideration of mitigating evidence.

To avoid misunderstandings in future cases, our opinion in *Easley, supra,* 34 Cal.3d at page 878, footnote 10, set forth a more expansive "factor (k)" instruction. Thereafter, when reviewing "pre- *Easley*" cases in which the trial court instructed the jury in the language of former CALJIC No. 8.84.1, we have examined the entire record--including all of the jury instructions and the closing arguments of counsel--to determine whether the jury was indeed misled by the instruction. (*People v. Hamilton*

(1988) 46 Cal.3d 123, 146 [249 Cal.Rptr. 320, 756 P.2d 1348]; *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17 [230 Cal.Rptr. 834, 726 P.2d 516].)

A similar analysis was employed by the United States Supreme Court in *Boyde, supra,* 494 U.S. 370. There, as in *Easley, supra,* 34 Cal.3d 858, the defendant challenged former CALJIC No. 8.84.1, contending that it misled the jury into believing it could not consider all of the evidence presented by the defense. The high court held that to determine whether a jury was misled by an assertedly ambiguous instruction such as former CALJIC No. 8.84.1, a reviewing court must decide "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (494 U.S. at p. 380 [108 L.Ed.2d at p. 329.) Under the circumstances of that case, the *Boyde* court concluded, there was no reasonable likelihood that the jury had misapplied former CALJIC No. 8.84.1.[2]

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[2]The Attorney General's concession I mentioned at the outset of my opinion occurred during oral argument before the high court in *Boyde, supra,* 494 U.S. 370 [108 L.Ed.2d at p. 332]. According to a brief filed by the Attorney General in this case, the circumstances surrounding the concession were as follows: An amicus curiae brief filed on behalf of Boyde attempted to demonstrate the possibility that a jury could misread the scope of former CALJIC No. 8.84.1, by showing that in several cases the prosecutor had misread it. As supporting evidence, the amicus curiae brief in *Boyde* contained partial transcripts of other capital trials, including an excerpt from the prosecutor's closing argument in this particular case. After the defense attorney arguing *Boyde* before the United States Supreme Court made specific reference to that closing argument, one of the justices then asked the deputy attorney general arguing the case to respond. In the course of his

The majority relies heavily on *Boyde, supra,* 494 U.S. 370, 110 S.Ct. 1190, to conclude that the jury in this case did not misapply former CALJIC No. 8.84.1. This reliance is unfounded.

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argument, the deputy attorney general conceded that in this case the prosecutor's closing argument misled the jury.

In a footnote to its opinion in *Boyde,* the United States Supreme Court rejected amicus curiae's assertion that misinterpretation of former CALJIC No. 8.84.1 by prosecutors arguing to the jury in other cases showed that the jury in *Boyde* might have been confused. The court concluded that because prosecutors are "interested advocates," their arguments are not reflective of the likely conclusions of "reasonable jurors." (*Boyde, supra,* 494 U.S. at p. 386, fn. 6 [108 L.Ed.2d at p. 332].)

In this case, defendant has requested that we take judicial notice of the oral argument before the United States Supreme Court in *Boyde.* In his response, the Attorney General does not deny the concession in issue, but correctly points out that he is not bound by it. The majority denies the request for judicial notice, concluding that the high court's opinion in *Boyde* speaks for itself, and that the deputy attorney general's comments at oral argument before that court in *Boyde* are irrelevant to a proper resolution of this case. (Maj. opn., *ante,* p. 541 of 13 Cal.Rptr.2d, p. 1050 of 839 P.2d.) But this court has always considered the officially expressed views of the Attorney General, the state's chief law enforcement officer; and the Attorney General's opinions are frequently cited as legal authority by courts and parties alike. We should not ignore the Attorney General's views when, as in this case, they are expressed in oral argument before the nation's highest court.

One of the important factors cited by the high court in *Boyde, supra,* 494 U.S. 370, 110 S.Ct. 1190, in support of its holding that the jury in that case was not misled, was the type of evidence presented in mitigation. There, the defense presented evidence of the defendant's disadvantaged background and his strength of character in coping with a difficult childhood. The jury was instructed, in the language of former CALJIC No. 8.84.1, that it could consider " '[a]ny ... circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime,' " and was told that the term " 'extenuate' " meant " 'to lessen the seriousness of a crime as by giving an excuse.' " (*Boyde, supra,* 494 U.S. at p. 381, 110 S.Ct. at p. 1199.) Unless otherwise misled, the high court held, a jury was likely to conclude from these instructions that it could consider evidence of the defendant's disadvantaged background and his character strengths as a possible "excuse" for the seriousness of the crime. In other words, the jury was likely to reason that " ' "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*" ' " (at p. 382 [108 L.Ed.2d at p. 330], italics in original, quoting *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 [106 L.Ed.2d 256, 278, 109 S.Ct. 2934.)

Here, by contrast, the mitigating evidence defendant presented was of a very different nature. Defendant relied on evidence of his behavior *after* commission of the crime, arguing in essence that *despite* the gravity of the crime he committed, he was nevertheless "worth saving." Unlike evidence of a disadvantaged background, that evidence does not fit neatly, if it fits at all, into factor (k), because it is not an "excuse" for the commission of the crime. Thus, the jurors in this case were more likely to be misled when they attempted to apply former CALJIC No. 8.84.1 than were the jurors who evaluated the "disadvantaged background" evidence presented by the defendant in *Boyde.*

More important than the type of mitigating evidence offered in this case, however, was the prosecutor's closing argument. Here, unlike *Boyde, supra,* 494 U.S. 370, *Easley, supra,* 34 Cal.3d 858, or any other case we have had before us, the prosecutor repeatedly argued to the jury that it legally could not consider any of the mitigating evidence presented by the defense. Despite defense counsel's objection, this argument was not corrected by the trial court, which ruled that the prosecutor and defense counsel could present *to the jury* their opposing interpretations of the scope of factor (k).

The trial court's ruling was wrong. The proper scope of factor (k) is a question of *law,* not of fact. It is the trial court's duty to explain the law to the jury, not to place upon the jury the impossible burden of deciding which of two inconsistent views of the law is correct. The jurors in this case were laypersons; presumably they were unfamiliar with the legislative history of factor (k) or with cases interpreting the Eighth Amendment. Thus, they were totally unequipped to decide whether the prosecutor or defense counsel had correctly explained to them which evidence they were entitled to consider in deciding whether defendant should live or die. (See *Griffin v. United States* (1991) 502 U.S. 46, [116 L.Ed.2d 371, 382-383, 112 S.Ct. 466, 474.]: "Jurors are not generally equipped to determine whether a particular theory ... submitted to them is contrary to law .... When ... jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.")

Nonetheless, the majority confidently finds no reasonable likelihood that the jury erred in discharging the impossible burden placed upon it. The reasons for the majority's conclusion do not withstand scrutiny.

The majority asserts that the prosecutor's argument was "blunted" by the trial court's remarks following defense counsel's objection. (Maj. opn., *ante,* p. 1071.) Not so. The trial court overruled that objection, permitting the prosecutor to repeat the improper argument. Although the trial court told the jury that the arguments of counsel were "not evidence," this admonition did not assist the jury in evaluating the legal soundness of the prosecutor's argument.

According to the majority, the prosecutor "implicitly conceded" that defendant's mitigating evidence was relevant, by devoting "substantial attention" to it. (Maj. opn., *ante,* p. 1071.) But the prosecutor made no such concession. True, he did discuss defendant's evidence, but he prefaced his remarks by reminding the jury that the evidence was not "applicable." In essence, the prosecution asserted that even if the evidence of defendant's Christian conversion was relevant, it did not outweigh the aggravating circumstances in this case. At no time did the prosecutor acknowledge, explicitly or implicitly, that the jury could legally consider defendant's mitigating evidence.

The majority asserts that the jury must have believed that it could consider defendant's mitigating evidence, because to conclude otherwise would transform defendant's favorable penalty phase evidence into a " ' "charade." ' " (Maj. opn., *ante,* p. 1072.) Although this argument was persuasive in *Boyde, supra,* 494 U.S. at page 383 [108 L.Ed.2d at page 331], it is far less convincing under the facts of this case. In *Boyde,* faced only with an ambiguous instruction, the jury was unlikely to believe that the instruction required it to disregard the defense's entire penalty presentation. Here, however, the jury was confronted not only with an ambiguous instruction, but with an explicit argument by the prosecutor that it should ignore the mitigating testimony offered by the defense. Any reluctance by the jury to believe that the defense had presented a "charade" may well have vanished in the face of this persuasive argument.

The majority maintains that the jurors must have considered defendant's evidence of a Christian conversion, because they were told to consider " 'all of the evidence which has been received during any part of the trial ....' " (Maj. opn., *ante,* p. 1072.) The majority, however, omits the conclusion to the instruction, which told the jury it could consider "all of the evidence which has been received during any part of the trial in this case, *except as you may be hereafter instructed.*" (Italics added.) The jury may have believed that the instruction which immediately followed, former CALJIC No. 8.84.1, was the exception referred to by the italicized words quoted above, and that former CALJIC No. 8.84.1 limited the jury's ability to consider the evidence presented by defendant.

An additional instruction also suggested to the jury that it should disregard the mitigating evidence presented by the defense. The court instructed the jury: "After having heard all of the evidence *and after having heard and considered the argument of counsel,* you shall consider, take into account *and be guided by the applicable factors of aggravating and mitigating circumstances* upon which you have been instructed." (Italics added.) The court's statement to the jury that its consideration of "all of the evidence" should be guided by "the arguments of counsel" and "the applicable factors of aggravating and mitigating circumstances," was tantamount to an instruction to the jury that its power to consider the evidence was not unlimited. This instruction could only strengthen the prosecutor's erroneous and repeated argument to the jury that it could not legally consider defendant's mitigating evidence, and the jury may well have acted accordingly.

In the majority's view, defense counsel's closing argument accurately explained to the jury the meaning of former CALJIC No. 8.84.1. But the majority's reliance on defense counsel's closing argument is unfounded, because the trial court's instructions deprived counsel of the necessary tools with which

to defeat the prosecutor's erroneous claim that the jury should disregard defendant's mitigating evidence. Although defense counsel told the jury it was legally entitled to consider the evidence of defendant's Christian conversion, he was unable to point to any language in former CALJIC No. 8.84.1 that would support this claim. Instead, he could only suggest that although the instruction was "awkwardly worded," it nevertheless was designed to include the evidence presented by the defense. A reasonable jury would not have been persuaded by this unconvincing, unsupported assertion.

III.

As explained above, I find a "reasonable likelihood" (*Boyde, supra,* 494 U.S. at p. 380, [108 L.Ed.2d at p. 329]) that, based on the trial court's instructions and the prosecutor's misstatement of the law in his closing argument, the jury was misled into believing that it could not consider defendant's evidence in mitigation when it decided to impose the death penalty. The question then is whether the error was harmless. Because the error violated defendant's Eighth Amendment right to have the jury consider relevant mitigating evidence presented on his behalf, it was of federal constitutional dimension, and must be evaluated under the "beyond a reasonable doubt" test established in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 711-712, 87 S.Ct. 824, 24 A.L.R.3d 1965]. (*People v. Hamilton, supra,* 46 Cal.3d at p. 148.) I conclude that the error was prejudicial.

The jailhouse redemption evidence constituted defendant's entire case in mitigation. Eight witnesses testified on defendant's behalf, including a deputy sheriff at the jail who "would have had no particular reason to be favorably predisposed toward one of [his] charges ...." (*Skipper v. South Carolina, supra,* 476 U.S. at p. 8 [90 L.Ed.2d at p. 9].) This evidence, if believed, might have persuaded the jury to spare

defendant's life. Although the crimes defendant committed were heinous, they were not of such magnitude as to make a death verdict a foregone conclusion. (Compare *People v. Clark* (1992) 3 Cal.4th 41, 162-163 [10 Cal.Rptr.2d 554, 833 P.2d 561].)

In sum, I cannot say beyond a reasonable doubt that had the jury believed it could consider the mitigating evidence presented by defendant, it would nevertheless have imposed a sentence of death. Accordingly, although I would affirm the convictions and the special circumstance finding, I would reverse the judgment of death.

Mosk, J., concurred.

Appellant's petition for rehearing was denied February 10, 1993. Mosk, J., and Kennard, J., were of the opinion that the petition should be granted.

APPENDIX G

APPENDIX G

California Penal Code section 190.3

§ 190.3. Determination of death penalty or life imprisonment; evidence of aggravating and mitigating circumstances; considerations

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was

prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the

mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

(Added by § 8 of Initiative Measure approved Nov. 7, 1978.)